

- VOLUME 25 -

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

- - -

UNITED STATES OF AMERICA, : CRIMINAL ACTION

Plaintiff, :

vs. :

DAVID R. GIBSON, ROBERT :

V.A. HARRA, WILLIAM :

NORTH, and KEVYN RAKOWSKI, :

Defendants. : NO. 15-23-RGA

- - -

Wilmington, Delaware
Monday, April 23, 2018
8:40 o'clock, a.m.

- - -

BEFORE: HONORABLE RICHARD G. ANDREWS, U.S.D.C.J., and a
jury

- - -

APPEARANCES:

LESLEY F. WOLF, ESQ.,
ROBERT F. KRAVETZ, ESQ. and
JAMIE M. McCALL, ESQ.
Assistant United States Attorneys

Counsel for Plaintiff

Valerie J. Gunning
Leonard A. Dibbs
Official Court Reporters

1 APPEARANCES (Continued) :

2 McCARTER & ENGLISH

3 BY: STEVEN P. WOOD, ESQ.

4 -and-

5 ANDREW M. LAWLER P.C.

6 BY: ANDREW W. LAWLER, ESQ.

7
8 Counsel for Defendant
9 Robert Harra

10 DALTON & ASSOCIATES

11 BY: BARTHOLOMEW DALTON, ESQ.

12 -and-

13 KROVATIN KLINGEMAN LLC

14 BY: HENRY KLINGEMAN, ESQ.
15 (Newark, New Jersey)

16 Counsel for Defendant
17 Kevyn Rakowski

1 **APPEARANCES (Continued) :**

2 **WILKS LUKOFF & BRACEGIRDLE LLC**

3 **BY: DAVID W. WILKS, ESQ.,**
4 **THOMAS FOLEY, ESQ. and**
5 **R. STOKES NOLTE, ESQ.**

6 **Counsel for Defendant**
7 **William North**

8 **PAUL HASTINGS LLP**

9 **BY: KENNETH M. BREEN, ESQ. and**
10 **PHARA SERLE GUBERMAN, ESQ.**

11 **Counsel for Defendant**
12 **David Gibson**

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P R O C E E D I N G S

(Proceedings commenced in the courtroom,
beginning at 8:40 a.m.)

THE COURT: All right. Good morning, everyone.
Please be seated.

I just want to touch base on a couple things,
one of which is the parties should file whatever objections,
the e-mail correspondence over the weekend, everybody ought
to make a record of whatever it is they want to make a
record of.

I'm also curious what the Government's thought
is, if they have any better estimate now than they did last
week as to how long they think their closing is going to
be.

MR. KRAVETZ: It will take one break, I think.

THE COURT: Okay. Well --

MR. KRAVETZ: So I think the estimate was three
hours.

THE COURT: Yes.

MR. KRAVETZ: Probably still around there.

THE COURT: Okay. All right. Fine. All right.
And so I will ask the jury to, even though I think they've
been pretty much sitting in the same seats these days, I

1 will ask them to maintain their seats and I will provide a
2 list of who is sitting where, but maybe not until after --
3 not right away.

4 The other thing is, in terms of my jury charge,
5 I don't have a good sense as to how long it's going to take
6 me, but I figured it would take somewhere between
7 one-and-a-half and two hours, and it's very likely I might
8 take a break at the halfway mark because there's a limit to
9 how long I can talk, which actually I can talk for longer
10 than the jury can listen, so we'll probably take at least a
11 short break to give everyone a chance to wake up.

12 All right. Are there any other issues to deal
13 with?

14 MS. WOLF: Your Honor, we actually seem to have
15 resolved all issues relating to admitted documents.

16 THE COURT: That's good. Thank you.

17 MS. WOLF: I have a slightly modified version of
18 the exhibit list, which just reflects redactions to
19 particular documents, and I will provide it to the clerk on
20 a break, Your Honor.

21 THE COURT: All right. That would be great.

22 MR. WOOD: Your Honor, my understanding is the
23 Government is resting without putting on a rebuttal case.
24 That matters to us because the Third Circuit suggests that
25 we need to renew our motions for judgment of acquittal after

08:42:52 1 that happens.

08:42:52 2 THE COURT: All right. So why don't we -- and
08:42:55 3 I'm glad you mentioned that, because though I had asked
08:42:57 4 about that, I do think the Government ought to -- that's
08:43:04 5 actually the first thing we ought to do, is have them rest
08:43:07 6 in front of the jury, and I will just take it that you've
08:43:10 7 made, renewed all your motions. And if you want to argue at
08:43:16 8 some later time, that's fine, but let's not do it --

08:43:19 9 MR. WOOD: Yes. All I was going to say is on
08:43:21 10 behalf of Harra, we do renew the motion and also ask the
08:43:24 11 Court to take into consideration any evidence after --

08:43:27 12 THE COURT: I assume that is on behalf of all
08:43:29 13 the defendants. If you want to put it on the record, that
08:43:31 14 would be good.

08:43:32 15 MR. NOWAK: Yes. That's on behalf of Mr. Gibson
08:43:32 16 as well, Your Honor.

08:43:36 17 MR. WILKS: And on behalf on Mr. North. Thank
08:43:39 18 you, Your Honor.

08:43:39 19 MR. KLINGEMAN: Just to make it clear, on behalf
08:43:40 20 of Ms. Rakowski, we're preserving any issues we've raised up
08:43:45 21 to and through the defense case.

08:43:48 22 THE COURT: Yes. The record will reflect, as
08:43:52 23 far as I'm concerned, you've made these after the Government
08:43:54 24 rests rather than before so you don't have to make them
08:43:57 25 again. What I expect is when the jury comes in, the

08:44:00 1 Government will say, we rest, and then I will start charging
08:44:04 2 the jury.

08:44:04 3 MR. KRAVETZ: And, Your Honor, I appreciated the
08:44:08 4 opportunity to confer with Mr. Klingeman over the weekend,
08:44:13 5 and I understand Mr. Klingeman is going to put this on the
08:44:15 6 record, but if you recall, we discussed at sidebar that
08:44:18 7 defendant Rakowski was not presenting the OTS Q&A evidence
08:44:24 8 and confirmed that with Mr. Klingeman.

08:44:26 9 THE COURT: Okay.

08:44:27 10 MR. KRAVETZ: Just because it might have
08:44:28 11 impacted whether we put a rebuttal case on or not or
08:44:31 12 requested to put on a rebuttal case. And also, we conferred
08:44:36 13 relating to Government Exhibit 524, which is the e-mail from
08:44:41 14 the desk file with the handwriting on top.

08:44:44 15 THE COURT: Right.

08:44:44 16 MR. KRAVETZ: And we discussed how at sidebar
08:44:47 17 Mr. Klingeman made certain representations about what he was
08:44:51 18 not going to say in closing relating to that document. It's
08:44:55 19 my understanding Mr. Klingeman is prepared to place that on
08:44:58 20 the record again just prior to us resting.

08:45:02 21 THE COURT: If it's already on the record once,
08:45:04 22 why do we need to place it on again?

08:45:07 23 MR. KRAVETZ: I'm content with that.

08:45:08 24 THE COURT: Mr. Klingeman?

08:45:09 25 MR. KLINGEMAN: I'm content with that as well.

08:45:11 1 THE COURT: Okay.

08:45:12 2 MR. KRAVETZ: Thank you, Your Honor.

08:45:13 3 THE COURT: All right. Anything else?

08:45:17 4 All right. Well, then, I will come back in in
08:45:21 5 15 minutes. Hopefully, the jury is all here, which I assume
08:45:24 6 they will be.

08:45:25 7 So you all can be seated. I just want to check
08:45:27 8 out one or two things, so just ignore me.

08:45:30 9 MR. KRAVETZ: Your Honor, will we get a copy of
08:45:32 10 the instructions to follow along with?

08:45:34 11 THE COURT: I e-mailed them to you at 8:30, and
08:45:37 12 unfortunately, if you want to follow along other than on
08:45:41 13 your computers, you need to start printing.

08:45:43 14 MR. KRAVETZ: Ms. Lotharp is all over it. We
08:45:46 15 have it.

08:45:46 16 THE COURT: Okay. I'm trying to save paper
08:46:04 17 here.

08:46:05 18 (Short recess taken.)

08:51:30 19 - - -

08:51:30 20 (Proceedings resumed after the short recess.)

09:02:31 21 THE COURT: All right. Good morning, again.
09:20:12 22 Please be seated.

09:20:13 23 I understand somebody wants to talk about the
09:20:14 24 jury instructions, so please tell me who and what it is your
09:20:17 25 problem is.

09:20:17 1 MS. WOLF: Your Honor, it's a minor point, and
09:20:19 2 actually, the parties are in agreement. On the bottom of
09:20:24 3 page 28, in the good faith instruction, at the bottom line,
09:20:28 4 the instruction originally read "and/or."

09:20:30 5 THE COURT: Yes.

09:20:31 6 MS. WOLF: It was changed just to read "or," but
09:20:34 7 the parties agree that it, that that line should
09:20:38 8 appropriately read "and/or."

09:20:40 9 THE COURT: So I'm correct to think the
09:20:45 10 circumstance of events was, the Government did a thing, said
09:20:50 11 "and/or." The defendant objected and said "or." The
09:20:54 12 Government didn't respond to that point.

09:20:56 13 That's where we got to that point?

09:20:57 14 MS. WOLF: And at the top, it was changed in two
09:20:58 15 places, and after talking to Mr. Nowak, at the top, it
09:21:02 16 appears not to alter the legal standard by just reading
09:21:05 17 "or," but as we read through it this morning in a final
09:21:09 18 run-through, it does appear, because certain of the counts
09:21:13 19 don't require a finding of willfulness, that it could
09:21:17 20 potentially create confusion.

09:21:18 21 THE COURT: Okay. Well, I am just going to read
09:21:21 22 in "and" there. Page 28.

09:21:24 23 What else?

09:21:25 24 MS. WOLF: That's it, Your Honor.

09:21:27 25 THE COURT: Oh.

09:21:29 1 MS. WOLF: Sorry to disappoint.

09:21:30 2 THE COURT: I was led to believe there were more

09:21:33 3 percolating matters.

09:21:36 4 MS. WOLF: No.

09:21:37 5 THE COURT: All right. Are we ready to go?

09:21:40 6 MR. KRAVETZ: Yes, Your Honor.

09:21:40 7 THE COURT: All right.

09:22:40 8 (The jury entered the courtroom.)

09:23:35 9 THE COURT: All right. Everyone may be seated.

09:23:37 10 Members of the jury, welcome back.

09:23:38 11 Have you followed my instructions since the last

09:23:41 12 time we saw you on Tuesday?

09:23:42 13 (The jury responds, "Yes.")

09:23:45 14 THE COURT: All right. Mr. Kravetz?

09:23:46 15 MR. KRAVETZ: Your Honor, the United States

09:23:47 16 rests.

09:23:47 17 THE COURT: All right. Thank you.

09:23:51 18 So, members of the jury, I'm about to start the

09:24:00 19 closing instructions, which actually, I will ask right now

09:24:05 20 that we hand out.

09:24:15 21 (The clerk handed copies of the jury

09:24:19 22 instructions to the jury.)

09:24:47 23 THE COURT: And before I start, I just want to

09:24:51 24 say that these instructions are really long, and I know

09:25:00 25 there are human limits to how long you can listen to me talk

1 and continue to absorb the information. So as you'll see,
2 you will be getting these, or you're going to have these
3 instructions in writing, and I expect that I will take a
4 break somewhere in the middle of this just to give you a
5 chance to become more alert. All right?

6 Members of the jury, you just heard and have
7 seen all the evidence in this case. Shortly, the parties
8 will have the opportunity to present their closing
9 arguments. The Government will argue first, then the
10 defendants will present their closing arguments, and
11 finally, the Government may argue in response or in rebut to
12 the defendants' arguments.

13 Closing arguments are designed to present to you
14 the parties' theories about what the evidence has shown and
15 what conclusions may be drawn from the evidence. Remember,
16 what is said in closing arguments is not evidence. You have
17 already heard and seen all the evidence in this case.

18 Before the parties present their closing
19 arguments, I will give you my final instructions concerning
20 the law that you must apply to the evidence in reaching your
21 verdict. Although the parties may mention points of law in
22 their closing arguments, the law that you must follow in
23 reaching your verdict is the law that I give you in my final
24 instructions. If there is any difference between what the
25 parties say about the law and what I tell you in my final

09:26:32 1 instructions, you must follow my instructions.

09:26:35 2 Members of the jury, you have seen and heard all
09:26:44 3 the evidence and the arguments of the lawyers. Now I will
09:26:47 4 instruct you on the law.

09:26:48 5 You have two duties as a jury. Your first duty
09:26:52 6 is to decide the facts from the evidence that you have heard
09:26:54 7 and seen in court during this trial. That is your job and
09:26:58 8 yours alone. I play no party in finding the facts. You
09:27:01 9 should not take anything I may have said or done during the
09:27:03 10 trial as indicating what I think of the evidence or what I
09:27:09 11 think about what your verdict should be.

09:27:12 12 Your second duty is to apply the law that I give
09:27:15 13 you to the facts. My role now is to explain to you the
09:27:18 14 legal principles that must guide you in your decisions. You
09:27:21 15 must apply my instructions carefully. Each of the
09:27:24 16 instructions is important, and you must apply all of them.
09:27:27 17 You must not substitute or follow your own notion or opinion
09:27:30 18 about what the law is or ought to be. You must apply the
09:27:35 19 law that I give to you, whether you agree with it or not.

09:27:38 20 Whatever your verdict, it will have to be
09:27:40 21 unanimous. All of you will have to agree on it or there
09:27:45 22 will be no verdict. In the jury room you will discuss the
09:27:47 23 case among yourselves, but ultimately each of you will have
09:27:50 24 to make up his or her own mind. This is a responsibility
09:27:54 25 that each of you has and that you cannot avoid.

1 During your deliberations, you must not
2 communicate with, receive any information from, or provide
3 any information to anyone by any means about this case. You
4 may not use any electronic device or media, such as the
5 telephone, a cellphone, smart phone, iPhone, Blackberry or
6 computer, the Internet, any Internet service, any text or
7 instant messaging service, any Internet chat room, blog, or
8 website such as Facebook, MySpace, LinkedIn, YouTube or
9 Twitter, to communicate to anyone any information about this
10 case, to receive any information about this case, or to
11 conduct any research about this case until I accept your
12 verdict. In other words, you cannot talk to anyone on the
13 phone, correspond with anyone, or electronically communicate
14 with anyone about this case. You can only discuss the case
15 in the jury room with your fellow jurors during
16 deliberations.

17 You may not use these electronic means to
18 investigate or communicate about the case because it is
19 important that you decide this case based solely on the
20 evidence presented in this courtroom. You are only
21 permitted to discuss the case with your fellow jurors during
22 deliberations because they have seen and heard the same
23 evidence you have. In our judicial system, it is important
24 that you are not influenced by anything or anyone outside of
25 this courtroom.

1 Perform these duties fairly and impartially. Do
2 not allow sympathy, prejudice, fear, or public opinion to
3 influence you. You should also not be influenced by
4 anyone's race, color, religion, national ancestry, or
5 gender, sexual orientation, profession, occupation,
6 celebrity, economic circumstances, or position in life or in
7 the community. The fact that the prosecution is brought in
8 the name of the United States of America does not entitle
9 the Government to any greater consideration than that when
10 you give to Mr. Gibson, Mr. Harra, Mr. North and Ms.
11 Rakowski.

12 The defendants Mr. Gibson, Mr. Harra, Mr. North,
13 and Ms. Rakowski are all charged with more than one offense;
14 each offense is charged in a separate count of the
15 indictment. I will explain to you in more detail shortly
16 which defendants are charged with which offenses. Before I
17 do that, however, I want to emphasize several things.

18 The number of offenses charged is not evidence
19 of guilt, and this should not influence your decision in any
20 way. Also, in our system of justice, guilt or innocence is
21 personal and individual. You must separately consider the
22 evidence against each defendant on each offense charged, and
23 you must return a separate verdict for each defendant for
24 each count. For each defendant and each count, you must
25 decide whether the Government has proven beyond a reasonable

09:30:49 1 doubt that a particular defendant is guilty of a particular
09:30:51 2 offense.

09:30:52 3 Your decision on any one defendant or any one
09:30:55 4 count, whether guilty or not guilty, should not influence
09:31:00 5 your decision on any of the other defendants or counts.
09:31:03 6 Each count and each defendant should be considered
09:31:05 7 separately.

09:31:06 8 The defendants Mr. Gibson, Mr. Harra, Mr. North,
09:31:13 9 and Ms. Rakowski have all pleaded not guilty to the offenses
09:31:18 10 charged. Each defendant is presumed to be innocent. Each
09:31:21 11 defendant started the trial with a clean slate, with no
09:31:23 12 evidence against him or her. The presumption of innocence
09:31:26 13 stays with each defendant unless and until the Government
09:31:28 14 has presented evidence that overcomes that presumption by
09:31:31 15 convincing you that the defendant you are considering is
09:31:33 16 guilty of the offense charged beyond a reasonable doubt.
09:31:35 17 The presumption of innocence requires that you find each
09:31:38 18 defendant not guilty, unless you are satisfied that the
09:31:41 19 Government has proved guilt of that defendant on the count
09:31:43 20 you are considering beyond a reasonable doubt.

09:31:45 21 The presumption of innocence means that
09:31:49 22 Mr. Gibson, Mr. Harra, Mr. North, and Ms. Rakowski have no
09:31:53 23 burden or obligation to present any evidence at all or to
09:31:56 24 prove that they are not guilty. The burden or obligation of
09:31:59 25 proof is on the Government to prove that the defendant is

09:32:01 1 guilty beyond a reasonable doubt, and this burden stays with
09:32:04 2 the Government throughout the trial.

09:32:05 3 In order for you to find Mr. Gibson, Mr. Harra,
09:32:09 4 Mr. North, and Ms. Rakowski guilty of any offense charged,
09:32:13 5 the Government must convince you that the defendant you are
09:32:15 6 considering is guilty beyond a reasonable doubt. That means
09:32:18 7 that the Government must prove each and every element of
09:32:21 8 each offense charged beyond a reasonable doubt. A defendant
09:32:23 9 may not be convicted based on suspicion or conjecture, but
09:32:28 10 only on evidence proving guilt beyond a reasonable doubt.

09:32:30 11 Proof beyond a reasonable doubt does not mean
09:32:34 12 proof beyond all possible doubt or to a mathematical
09:32:38 13 certainty. Possible doubts or doubts based on conjecture,
09:32:41 14 speculation, or hunch are not reasonable doubts. A
09:32:44 15 reasonable doubt is a fair doubt based on reason, logic,
09:32:48 16 common sense, or experience. It is a doubt that an ordinary
09:32:51 17 reasonable person has after carefully weighing all of the
09:32:54 18 evidence, and is a doubt of the sort that would cause him or
09:32:58 19 her to hesitate to act in matters of importance in his or
09:33:09 20 her own life. It may arise from the evidence, or from the
09:33:12 21 lack of evidence, or from the nature of the evidence.

09:33:14 22 If, having now heard all the evidence, you are
09:33:26 23 convinced that the Government proved each and every element
09:33:28 24 of an offense charged beyond a reasonable doubt with respect
09:33:31 25 to the defendant you are considering, you should return a

1 verdict of guilty for that defendant on that count.

2 However, if you have a reasonable doubt about one or more of
3 the elements of an offense charged with respect to the
4 defendant you are considering, then you must return a
5 verdict of not guilty for that defendant on that count.

6 You must make your decision in this case based
7 only on the evidence that you saw and heard in the
8 courtroom. Do not let rumors, suspicions, or anything else
9 that you may have seen or heard outside of court influence
10 your decision in any way.

11 The evidence from which you are to find the
12 facts consist of the following:

13 The testimony of the witnesses.

14 Documents and other things received as exhibits.

15 And any fact or testimony that was stipulated;
16 that is, formally agreed to by the parties.

17 The following is not evidence:

18 The indictment.

19 Statements and arguments of the lawyers for the
20 parties in this case.

21 Questions by the lawyers and questions that I
22 might have asked.

23 Objections by lawyers, including objections in
24 which the lawyers stated facts.

25 Any testimony I struck or told you to disregard.

09:34:38 1 And anything you may have seen or heard about
09:34:41 2 this case outside the courtroom.

09:34:42 3 You should use your common sense in weighing the
09:34:44 4 evidence. Consider it in light of your everyday experience
09:34:47 5 with people and events, and give it whatever weight you
09:34:50 6 believe it deserves.

09:34:50 7 As I told you in my preliminary instructions,
09:34:55 8 the Rules of Evidence control what can be received into
09:34:58 9 evidence. During the trial the lawyers objected when they
09:35:01 10 thought that evidence was offered that was not permitted by
09:35:04 11 the Rules of Evidence. These objections simply meant that
09:35:07 12 the lawyers were asking me to decide whether the evidence
09:35:09 13 should be allowed under the rules.

09:35:10 14 You should not be influenced by the fact that an
09:35:14 15 objection was made. You should also not be influenced by my
09:35:18 16 rulings on objections or any sidebar conferences you may
09:35:27 17 have overheard. When I overruled an objection, the question
09:35:30 18 was answered or the exhibit was received as evidence, and
09:35:32 19 you should treat that testimony or exhibit like any other.

09:35:35 20 When I sustained an objection, the question was
09:35:45 21 not answered or the exhibit was not received as evidence.
09:35:48 22 You must disregard the question or the exhibit entirely.
09:35:51 23 Do not think about or guess what the witness might have said
09:35:54 24 in answer to the question; do not think about or guess what
09:35:57 25 the exhibit might have shown. Sometimes a witness may have

1 already answered before a lawyer objected or before I ruled
2 on the objection. If that happened and if I sustained the
3 objection, you must disregard the answer that was given.

4 Also, if I ordered that some testimony or other
5 evidence be stricken or removed from the record, you must
6 disregard that evidence. When you are deciding this case,
7 you must not consider or be influence in any way by the
8 testimony or other evidence that I told you to disregard.

9 Although the lawyers may have called, or may
10 call your attention to certain facts or factual conclusions
11 that they thought were important, what the lawyers say is
12 not evidence and is not binding on you. It is your own
13 recollection and interpretation of the evidence that
14 controls your decision in this case. Also, do not assume
15 that anything I may have done or said during the trial, that
16 I have any opinion about any of the issues in this case, or
17 about what your verdict should be.

18 Two types of evidence may be used in this trial,
19 direct evidence and circumstantial evidence (or indirect)
20 evidence. You may use both types of evidence in reaching
21 your verdict.

22 Direct evidence is simply evidence which, if
23 believed, directly proves a fact. An example of direct
24 evidence occurs when a witness testifies about something the
25 witness knows from his or her own senses -- something the

09:37:37 1 witness has seen, touched, heard, or smelled.

09:37:40 2 Circumstantial evidence is evidence which, if
09:37:42 3 believed, indirectly proves a fact. It is evidence that
09:37:45 4 proves one or more facts from which you could reasonably
09:37:48 5 find or infer the existence of some other fact or facts. A
09:37:51 6 reasonable inference is simply a deduction or conclusion
09:37:53 7 that reason, experience, and common sense lead you to make
09:37:57 8 from the evidence. A reasonable inference is not a
09:38:00 9 suspicion or a guess. It is a reasoned, logical decision to
09:38:05 10 find that a disputed fact exists on the basis of another
09:38:07 11 fact.

09:38:08 12 For example, if someone walked into the
09:38:10 13 courtroom wearing a wet raincoat and carrying a wet
09:38:13 14 umbrella, that would be circumstantial or indirect evidence
09:38:15 15 from which you could reasonably find or conclude that it was
09:38:19 16 raining. You would not have to find that it was raining,
09:38:21 17 but you could.

09:38:21 18 Sometimes different inferences may be drawn from
09:38:24 19 the same set of facts. The Government may ask you to draw
09:38:26 20 one inference, and the defense may ask you to draw another.
09:38:30 21 You, and you alone, must decide what reasonable inferences
09:38:33 22 you will draw based on all the evidence and your reason,
09:38:35 23 experience and common sense.

09:38:37 24 You should consider all the evidence that is
09:38:41 25 presented in this trial, direct and circumstantial. The law

1 makes no distinction between the weight that you should give
2 to either direct or circumstantial evidence. It is for you
3 to decide how much weight to give any evidence.

4 Many of you have taken notes during the course
5 of the trial.

6 If you have taken notes, you may use your notes
7 only as an aid to your own independent recollection of the
8 evidence. Your notes are not evidence, and they are not
9 entitled to any greater weight than the actual recollection
10 of each juror as to what the evidence actually is. It is
11 your recollection of the evidence, not your notes, which
12 should control during your deliberations. If you have not
13 taken notes, you should rely upon your own independent
14 recollection of the proceedings and not be unduly influenced
15 by the notes of other jurors. Similarly, none of you may
16 use the mere fact that you took notes to try and influence
17 any other juror.

18 I emphasize that notes are not entitled to any
19 greater weight than the memory or impression of each juror
20 as to what the testimony may have been.

21 It is the duty of an attorney to object when
22 testimony or evidence is offered which the attorney believes
23 is not properly admissible. Counsel also have the right and
24 duty to ask the Court to make rulings of law. All of those
25 questions of law must be decided by the Court. You should

1 not show any prejudice against an attorney or his or her
2 client because the attorney objected to the admissibility
3 of evidence, or asked the Court for a ruling on the law.

4 My rulings on the admissibility of evidence
5 do not indicate any opinion about the weight or effect of
6 such evidence. You are the sole judges of the credibility
7 of all witnesses and the weight and effect of all of the
8 evidence.

9 In certain instances evidence was admitted
10 only for a particular purpose and not generally for all
11 purposes.

12 For example, from time to time, I permitted a
13 witness to testify about what another person said out of
14 court, and at the time of such testimony I instructed you
15 that the out-of-court statements were being admitted for a
16 limited purpose. Similarly, from time to time I admitted an
17 exhibit into evidence for a limited purpose. For the
18 limited purpose for which the testimony or exhibit was
19 received, you may give it such weight as you feel it
20 deserves. You may not, however, use such testimony or
21 exhibits for any other purpose other than the limited
22 purpose for which it was admit.

23 Although the Government is required to prove the
24 defendant guilty beyond a reasonable doubt, the Government
25 is not required to present all possible evidence related to

1 the case or to produce all possible witnesses that might
2 have some knowledge about the facts of the case.

3 In this case, the defendants presented evidence
4 and produced witnesses. The defendants are not required to
5 present all possible evidence related to the case or to
6 produce all possible witnesses who might have some knowledge
7 about the facts of the case.

8 The Government and the defendant have agreed
9 that certain facts contained in a stipulation signed by the
10 parties are true. You should therefore treat these facts as
11 having been proved. You are not required to do so, however,
12 since you are the sole judge of the facts.

13 As I stated in my preliminary instructions at
14 the beginning of the trial, in deciding what the facts are,
15 you must decide what testimony you believe and what
16 testimony you do not believe. You are the sole judges of
17 the credibility of the witnesses. Credibility refers to
18 whether a witness is worthy of belief: Was the witness
19 truthful? Was the witness' testimony accurate? You may
20 believe everything a witness says, or only part of it, or
21 none of it.

22 You may decide whether to believe a witness
23 based on his or her behavior and manner of testifying, the
24 explanations the witness gave, and all the other evidence in
25 the case, just as you would in any important matter where

1 you are trying to decide if a person is truthful,
2 straightforward, and accurate in his or her recollection.

3 In deciding the question of credibility, remember to use
4 your common sense, your good judgment, and your experience.

5 In deciding what to believe, you may consider a
6 number of factors:

7 The opportunity and ability of the witness to
8 see or hear or know the things about which the witness
9 testified.

10 The quality of the witness' knowledge,
11 understanding, and memory.

12 The witness' appearance, behavior, and manner
13 while testifying.

14 Whether the witness has an interest in the
15 outcome of the case or any motive, bias, or prejudice.

16 Any relation the witness may have with a party
17 in the case and any effect the verdict may have on the
18 witness.

19 Whether the witness said or wrote anything
20 before trial that was different from the witness' testimony
21 in court.

22 Whether the witness' testimony was consistent or
23 inconsistent with other evidence that you believe.

24 And other factors that bear on whether the
25 witness should be believed.

1 Inconsistencies or discrepancies in a witness'
2 testimony or between the testimony of different witnesses
3 may or may not cause you to disbelieve a witness' testimony.
4 Two or more persons witnessing an event may simply see or
5 hear it differently. Mistaken recollection, like failure to
6 recall, is a common human experience. In weighing the
7 effect of an inconsistency, you should also consider whether
8 it was about a matter of importance or an insignificant
9 detail. You should also consider whether the inconsistency
10 was innocent or intentional.

11 You are not required to accept testimony even if
12 the testimony was not contradicted and the witness was not
13 impeached. You may decide that the witness is not worthy of
14 belief because of the witness' bearing and demeanor, or
15 because of the inherent improbability of the testimony, or
16 for other reasons that are sufficient to you.

17 Based on your own judgment about the
18 believability of a witness, you can attach to that witness'
19 testimony the importance or weight that you think it
20 deserves.

21 The weight of the evidence to prove a fact does
22 not necessarily depend on the number of witnesses who
23 testified or the quantity of evidence that was presented.
24 What is more important than numbers or quantity is how
25 believable the witnesses were, and how much weight you think

09:45:07 1 their testimony deserves.

09:45:09 2 You have heard the testimony of law enforcement
09:45:16 3 officers. The fact that a witness is employed as a law
09:45:18 4 enforcement officer does not mean that his or her testimony
09:45:22 5 necessarily deserves more or less consideration or greater
09:45:25 6 or lesser weight than that of any other witness. At the
09:45:29 7 same time, it is quite legitimate for defense counsel to try
09:45:31 8 to attack the believability of a law enforcement witness on
09:45:35 9 the ground that his or her testimony may be colored by a
09:45:38 10 personal or professional interest in the outcome of the
09:45:41 11 case. You must decide, after reviewing all the evidence,
09:45:43 12 whether you believe the testimony of the law enforcement
09:45:46 13 witness and how much weight, if any, it deserves.

09:45:53 14 You have heard the testimony that Joseph
09:45:56 15 Terranova has made a plea agreement with the Government.

09:45:58 16 His testimony was received in evidence and may
09:46:01 17 be considered by you. The Government is permitted to
09:46:03 18 present the testimony of someone who has reached a plea
09:46:06 19 agreement with the Government in exchange for his testimony,
09:46:09 20 but you should consider the testimony of Mr. Terranova with
09:46:11 21 great care and caution.

09:46:13 22 In evaluating Mr. Terranova's testimony, you
09:46:15 23 should consider this factor along with the others I have
09:46:18 24 called to your attention. Whether or not Mr. Terranova's
09:46:22 25 testimony may have been influenced by the plea agreement is

09:46:25 1 for you to determine. You may give his testimony such
09:46:27 2 weight as you think it deserves.

09:46:29 3 You must not consider Mr. Terranova's guilty
09:46:35 4 plea as any evidence of any defendant's guilt. His decision
09:46:37 5 to plead guilty was a personal decision about his own guilt.
09:46:41 6 Such evidence is offered only to allow you to assess the
09:46:44 7 credibility of the witness. You may consider
09:46:48 8 Mr. Terranova's guilty plea only for this purpose.

09:46:50 9 You have heard the testimony of certain
09:46:56 10 witnesses. You have also heard that before this trial,
09:46:59 11 certain witnesses made statements that may be different from
09:47:02 12 other witness' testimony in this trial. It is up to you to
09:47:07 13 determine whether these statements were made and whether
09:47:08 14 they were different from the witness' testimony in this
09:47:10 15 trial. These earlier statements were brought to your
09:47:13 16 attention only to help you decide whether to believe the
09:47:16 17 witness' testimony here at trial. You cannot use it as
09:47:19 18 proof of the truth of what the witness said in the earlier
09:47:24 19 statement. You can only use it as one way of evaluating the
09:47:27 20 witness' testimony in this trial.

09:47:30 21 The Rules of Evidence ordinarily do not permit
09:47:37 22 witnesses to state their own opinions about important
09:47:39 23 questions in a trial, but there are exceptions to these
09:47:41 24 rules.

09:47:41 25 In this case, you heard from Donald Walker as an

expert in his field. As such, Mr. Walker was permitted to offer opinions in that field and the reason for those opinions.

The opinions that this witness stated should receive whatever weight you think appropriate, given all the other evidence in the case. In weighing the opinion testimony, you may consider the witness' qualifications, the reasons for the witness' opinions, and the reliability of information supporting the witness' testimony, as well as the other factors discussed in these instructions for weighing the testimony of witnesses. You may disregard an opinion entirely if you decide that the opinion was not based on sufficient knowledge, skill, experience, training, or education. You may also disregard an opinion if you conclude that the reasons given in support of the opinion are not sound, or if you conclude that the opinion is not supported by the facts shown by the evidence, or if you think that the opinion is outweighed by other evidence.

Defendants Harra, Gibson, North and Rakowski did not testify in this case. A defendant has an absolute constitutional right not to testify. The burden of proof remains with the prosecution throughout the entire trial and never shifts to the defendant. A defendant is never required to prove that he or she is innocent. You must not attach any significance to the fact that the defendant did

09:49:02 1 not testify. You must not draw any adverse inference
09:49:05 2 against him or her because he or she did not take the
09:49:08 3 witness stand. Do not consider, for any reason at all, the
09:49:10 4 fact that the defendant did not testify. Do not discuss the
09:49:12 5 fact during your deliberations or let it influence your
09:49:15 6 decision in any way.

09:49:16 7 A defendant who is an officer, director, or
09:49:27 8 employee of a corporation is not criminally responsible for
09:49:29 9 the alleged acts of other employees or subordinates merely
09:49:33 10 because the defendant held a position or positions with the
09:49:35 11 bank. Therefore, it is not enough for the Government to
09:49:38 12 prove that certain activity occurred at Wilmington Trust to
09:49:42 13 demonstrate that the defendant knew of the activity or was
09:49:44 14 responsible for that activity. Nor is it enough for the
09:49:47 15 Government to prove that one or more of the alleged
09:49:49 16 wrong-doers reported to the defendant. In addition, you may
09:49:55 17 not infer that the defendant, based solely on his or her
09:49:58 18 position at Wilmington Trust, had any knowledge of any
09:50:01 19 particular activity.

09:50:02 20 Furthermore, it is not enough for the Government
09:50:05 21 to prove that the defendant should have known about any
09:50:08 22 particular activity. You have heard reference at times
09:50:26 23 during the trial to Wilmington Trust internal policies
09:50:27 24 and procedures. While you should consider thoughtfully
09:50:30 25 evidence as to whether one or more of the defendants may

1 or may not have violated internal policies or procedures,
2 such a violation, by itself, is not a violation of criminal
3 law.

4 To the extent that the Government alleges
5 that one or more of the defendants may have violated a
6 bank policy or procedure, I instruct you that, whatever
7 you may determine from the evidence, a defendant who has
8 merely violated a bank policy or procedure or acted contrary
9 to a bank policy or procedure is not guilty of any federal
10 crime.

11 To convict a defendant of a crime, the
12 Government must prove beyond a reasonable doubt that each
13 element of the criminal statutes, which I will describe for
14 you, has been met.

15 You may, however, consider evidence of knowing
16 and intentional violations of internal policies and
17 procedures, as you would other evidence in determining
18 whether any of the defendants devised a scheme to defraud,
19 acted knowingly, willfully, or with the intent to defraud.
20 It is entirely up to you what weight to give this evidence.

21 You have heard reference at times during the
22 trial to regulations, regulatory guidance, and guidelines,
23 including SEC guidance, schedule RC-N instructions, and
24 generally accepted accounting principles (to as GAAP).
25 While you should consider thoughtfully evidence as to

1 whether one or more of the defendants may or may not have
2 violated a regulation or GAAP, you are instructed that a
3 violation of regulations, regulatory guidelines, and
4 guidance, including SEC guidance, schedule RC-N
5 instructions, and GAAP, is not, by itself, a violation of
6 criminal law.

7 To the extent that the Government alleges that
8 one or more of the defendants may have violated a regulation
9 or GAAP, I instruct you that, whatever you may determine
10 from the evidence, a defendant who has merely violated a
11 regulation or GAAP or acted contrary to regulatory guidance
12 or guidelines is not guilty of any federal crime. To
13 convict a defendant of a crime, the Government must prove
14 beyond a reasonable doubt that each element of the criminal
15 statutes, which I will describe for you, has been met.

16 You may, however, consider evidence of knowing
17 and intentional violations of federal banking and securities
18 laws, regulations and rules, as you would other evidence in
19 determining whether any of the defendants devised a scheme
20 to defraud, acted knowingly, willfully, or with the intent
21 to defraud. It is entirely up to you what weight to give
22 this evidence.

23 You will note that the indictment charges that
24 the offense was committed on or about or in or around a
25 certain date. The Government does not have to prove with

1 certainty the exact date of each alleged offense. It is
2 sufficient if the Government proves beyond a reasonable
3 doubt that the offense was committed on a date reasonably
4 near the date alleged.

5 The offenses charged in the indictment require
6 that the Government prove beyond a reasonable doubt that the
7 defendant you are considering acted knowingly, willfully,
8 and/or with intent to defraud.

9 These mental states apply to the various
10 offenses I will define shortly. I will define the mental
11 states for you now, and as I read through the elements of
12 the offenses, I will tell you when a particular mental state
13 applies.

14 To act knowingly means that the Government must
15 prove beyond a reasonable doubt that the defendant you are
16 considering was conscious and aware of the nature of his or
17 her actions and of the surrounding facts and circumstances,
18 as specified in the definition of the offenses charged. In
19 deciding whether the defendant acted knowingly, you may
20 consider evidence about what the defendant said, what the
21 defendant did and failed to do, how the defendant acted, and
22 all the other facts and circumstances shown by the evidence
23 that may prove what was in the defendant's mind at that
24 time.

25 To act willfully means the Government must prove

09:54:39 1 beyond a reasonable doubt that the defendant you are
09:54:40 2 considering knew his or her conduct was unlawful and
09:54:43 3 intended to do something that the law forbids. That is,
09:54:46 4 to find that the defendant acted willfully, you must find
09:54:49 5 that the evidence proved beyond a reasonable doubt that
09:54:51 6 the defendant acted with a purpose to disobey or disregard
09:54:54 7 the law. Willfully does not, however, require proof that
09:54:58 8 the defendant had any evil motive or bad purpose other than
09:55:02 9 the purpose to disobey or disregard the law. Willfully
09:55:06 10 does not require proof that the actor knew of the existence
09:55:09 11 and meaning of the statute making his or her conduct
09:55:12 12 criminal.

09:55:13 13 To act with an intent to defraud means to act
09:55:17 14 knowingly and with the intention or the purpose to deceive
09:55:19 15 or to cheat. In considering whether a defendant acted with
09:55:21 16 an intent to defraud, you may consider, among other things,
09:55:32 17 whether the defendant acted with a desire or purpose to
09:55:34 18 bring about some gain or benefit to himself or herself or
09:55:38 19 someone else or with a desire or purpose to cause some loss
09:55:42 20 to someone.

09:55:42 21 You may consider both direct evidence and
09:55:45 22 circumstantial evidence, including a defendant's words or
09:55:47 23 conduct and other facts and circumstances, in deciding
09:55:49 24 whether the defendant you are considering had the required
09:55:52 25 knowledge and criminal intent.

1 As I just explained, the offenses charged in the
2 indictment require proof that the defendant acted knowingly,
3 willfully, and/or with intent to defraud. If you find that
4 a defendant acted in good faith, that would be a complete
5 defense to the offense you are considering, because good
6 faith on the part of the defendant would be inconsistent
7 with his or her acting knowingly, willfully, or with that
8 intent to defraud.

9 For example, a person acts in good faith when he
10 or she has an honestly held belief, opinion, or
11 understanding that not all matured loans had to be reported
12 as past due, even though the belief, opinion, or
13 understanding turns out to be inaccurate or incorrect.
14 Thus, in this case if the defendant you are considering made
15 an honest mistake or had an honest misunderstanding about
16 whether all loans that were matured had to be reported as
17 past due, then the defendant did not act knowingly,
18 willfully, or with the intent to defraud.

19 In considering whether a defendant made an
20 honest mistake or had an honest misunderstanding about
21 whether mature loans had to be reported as past due loans,
22 you may consider the defendant's actions and beliefs in
23 relation to the term past due loan.

24 The defendants do not have the burden of proving
25 good faith. Good faith is a complete defense because it is

1 inconsistent with the requirement of the offenses charged,
2 that the defendant acted knowingly, willfully, and/or with
3 the intent to defraud. As I have told you, it is the
4 Government's burden to prove beyond a reasonable doubt each
5 element of the offenses, including the mental state element.
6 In deciding whether the Government proved that the defendant
7 you are considering acted with the required intent or,
8 instead, whether the defendant acted in good faith, you
9 should consider all of the evidence presented in the that
10 may bear on the defendant's state of mind.

11 The next sentence I'm going to read, I'm going
12 to add in a word that is not in the written version, and try
13 to make a note of it, because the way I'm going to read it
14 is the correct way, not the way it's actually written.

15 If you find for any reason that the Government
16 has not proved beyond a reasonable doubt that the defendant
17 acted knowingly, willfully, and/or with the intent to
18 defraud, you must find the defendant not guilty of the
19 particular offense you are considering. And just to be
20 clear, I said "and/or" instead of "or."

21 Motive is not an element of the offenses with
22 which the defendants are charged. Proof of motive is not
23 required to convict. Evidence of a defendant's motive may,
24 however, help you find that defendant's intent.

25 Intent and motive are different consents.

09:59:18 1 Motive is what prompts a person to act. Intent refers
09:59:22 2 only to the state of mind with which the particular act is
09:59:25 3 done.

09:59:31 4 As I will explain in more detail, Counts 1, 7 to
09:59:37 5 10, 11 to 13 and 16 allege the defendants made or caused to
09:59:44 6 be made false statements of various call reports, or as to
09:59:49 7 Count 16, a monthly regulatory report, that Wilmington Trust
09:59:54 8 filed with the Federal Reserve.

09:59:57 9 The Government alleges that the defendants made
09:59:59 10 or caused to be made a false statement regarding the bank's
10:00:02 11 loans that were past due 90 days or more. The specific
10:00:08 12 information that banks are required to report in call
10:00:11 13 reports are set forth in the document entitled "Instruction
10:00:15 14 For Preparation of Consolidated Reports of Condition and
10:00:19 15 Income," which I will now refer to as the call report
10:00:22 16 instructions.

10:00:24 17 Applicable to this case, the call report
10:00:28 18 instructions contain a section entitled general
10:00:32 19 instructions. The general instructions state that banks are
10:00:36 20 required to prepare and file the call reports in accordance
10:00:39 21 with these instructions. All reports shall be prepared in a
10:00:43 22 consistent manner. The general instructions state further
10:00:47 23 that questions and requests for interpretations of matters
10:00:51 24 appearing in any part of these instructions should be
10:00:54 25 addressed to the bank's primary federal bank's supervisory

1 agency, i.e., the Federal Reserve Bank, the OCC, or the
2 FDIC.

3 According to the general instructions,
4 regardless of whether a bank requested interpretation of a
5 matter appearing in these instructions, when a bank's
6 primary federal bank supervisory agency's interpretation of
7 the instruction differs from the bank's interpretation, the
8 supervisory agency may require the bank to prepare its call
9 report in accordance with the agency's interpretation and to
10 amend previously submitted reports.

11 Although the call report instructions are
12 designed to conform to United States generally accepted
13 accounting principles, or GAAP, when a bank's supervisory
14 agency's interpretation of how GAAP should be applied to a
15 specified event or transaction or series of related events
16 or transactions differs from the bank's interpretation, the
17 supervisory agency may require the bank to reflect the
18 events or transactions in its call report in accordance with
19 the agency's interpretation and to amend previously
20 submitted reports.

21 The reporting of past due loans is considered by
22 the instructions listed in schedule RC-N, past due and
23 nonaccrual loans, leases, or other assets. The schedule
24 RC-N instructions contain a definition of past due which
25 states, the past due status of a loan or other asset should

1 be determined in accordance with its contractual repayment
2 terms. The definition further states that grace periods
3 allowed by the bank after a loan or other asset technically
4 has become past due but before the imposition of late
5 charges are not to be taken into account in determining past
6 due status. In addition, the definition states that loans
7 are to be reported as past due when either interest or
8 principal is unpaid under five circumstances.

9 The third and fourth circumstances outlined
10 under the definition relate to single payment notes and debt
11 securities. The third circumstance states: Single payment
12 and demand notes, debt securities, and other assets
13 providing for the payment of interest as stated intervals
14 are to be reported as past due after one interest payment is
15 due and unpaid for 30 days.

16 The fourth circumstance outlined under the
17 definition covers the past due status of loans that are past
18 due because they have matured; that is, the loans are
19 overdue for principal repayment under the terms of a
20 contractual loan agreement. That circumstance states the
21 following: Single payment notes, debt securities, and other
22 assets providing for the payment of interest at maturity are
23 to be reported as past due after maturity if interest or
24 principal remaining unpaid for third days or more.

25 You have heard testimony relating to certain

1 reports that Wilmington Trust Corporation filed with the
2 Securities and Exchange Commission or SEC. These reports
3 include Form 10-Q and Form 10-K. These reports are
4 documents that publicly traded companies, like Wilmington
5 Trust Corporation, must file with the SEC. These reports
6 include financial statements that present a company's
7 operating results and cash flows for a particular financial
8 reporting period. A Form 10-Q relates to a quarterly
9 financial reporting period. A Form 10-K relates to an
10 annual financial reporting period. A company's Form 10-Q
11 and Form 10-K cannot, and need not, provide all the material
12 information that is available about the company. That is
13 not the function of a Form 10-Q or a Form 10-K. These
14 reports, taken as a whole, must disclose the information
15 that is required under the securities laws.

16 Counts 1 through 6 and 11 through 13 allege that
17 the defendants falsely reported Wilmington Trust
18 Corporation's quantity of accruing loans that were past due
19 90 days or more in the bank's SEC forms 10-Q for the third
20 quarter of 2009 and first quarter of 2010 and in the bank's
21 Form 10-K for 2009.

22 During the period of the indictment, SEC
23 regulation S-K set forth the requirements applicable to
24 the content of the non-financial statement portions of
25 periodic reports filed with the Securities and Exchange

Commission.

Item 303 of regulation S-K set forth the information that securities registrants were required to discuss in the Management's discussion and analysis of financial condition and results of operations section of periodic filings. Item 303 directs the attention of bank holding companies, such as Wilmington Trust Corporation, to the information called for in SEC industry Guide three.

SEC Industry Guide 3 governs statistical disclosures by bank holding companies. Section 3 of Guide 3, entitled loan portfolio contains a subsection entitled risk elements, which addresses the reporting of past due loans in SEC management discussion and analysis disclosures. The past due section states that bank holding companies must, as of the end of each reported period, state separately the aggregate of accruing loans which are contractually past due 90 days or more as to principal or interest payments.

During the period set forth in the indictment, federal securities regulations required public companies to file financial statements in accordance with generally accepted accounting principles, or GAAP. GAAP required that a securities registrant such as Wilmington Trust provide a summary of significant accounting policies in

1 its footnotes to financial statements contained in periodic
2 SEC filings.

3 GAAP further provided that an entity's summary
4 of significant accounting policies for financing receivable
5 shall include "the policy for determining past due or
6 delinquent status (that is, whether past due status is based
7 on how recently payments have been received or contractual
8 terms) ."

9 The defendants are charged in the indictment
10 with committing the following offenses:

11 Conspiracy to defraud the United States, commit
12 securities fraud, and make false statements to regulators
13 (Count 1) .

14 Securities fraud (Count 2) .

15 Making false statements in documents required to
16 be filed with the Securities and Exchange Commission
17 (Counts 4 and 6) .

18 Making false statements to the Securities and
19 Exchange Commission and the Federal Reserve (Counts 5 and 11
20 to 16) .

21 And making false entries in banking records
22 (Counts 7 to 10) .

23 In addition, Defendant David Gibson has been
24 charged with making false certifications in financial
25 reports (Counts 17 to 19) .

1 By the way, just so you aren't wondering later
2 on, there is no Count 3.

3 As I explained at the beginning of trial, an
4 indictment is just the formal way of specifying the exact
5 crimes the defendants are accused of committing. An
6 indictment is simply a description of the charges against a
7 defendant. It is an accusation only. An indictment is not
8 evidence of anything, and you should not give any weight to
9 the fact that anyone has been indicted in making your
10 decision in this case.

11 In order to find a defendant guilty of any of
12 the charged offenses, you must all find that the Government
13 proved each element of that offense beyond a reasonable
14 doubt, as I will explain in more detail shortly.

15 Count 1 of the indictment charges that from in
16 or around October 2009, through in or around November 2010,
17 in the District of Delaware, Defendants Robert Harra, David
18 Gibson, Kevyn Rakowski, and William North agreed or
19 conspired with one or more other persons, including Brian
20 Bailey and Joseph Terranova, to defraud the United States
21 and to commit offenses against the United States, namely
22 securities fraud, making false statements in quarterly and
23 annual reports filed with the Securities and Exchange
24 Commission, and making false statements to the Securities
25 and Exchange Commission and the Federal Reserve.

1 Count 1 further charges that, to further the
2 objective of the conspiracy, at least one member of the
3 conspiracy committed at least one overt act, as alleged in
4 the indictment.

5 It is a federal crime for two or more persons to
6 agree or conspire to defraud the United States or to commit
7 any offense against the United States, even if they never
8 actually achieve their objective. A conspiracy is a kind of
9 criminal partnership.

10 In order for you to find the defendant you are
11 considering guilty of conspiracy to defraud the United
12 States or to commit an offense against the United States,
13 you must find that the Government proved beyond a reasonable
14 doubt each of the following four elements.

15 First: That two or more persons agreed to
16 defraud the United States or to commit an offense against
17 the United States, as charged in the indictment. Defraud
18 the United States means to obstruct or interfere with one of
19 the United States Government's lawful functions, by deceit,
20 craft, trickery, or dishonest means. Because each of the
21 offenses against the United States alleged in the conspiracy
22 count are also alleged as separate offenses, I will explain
23 the elements of those alleged offenses against the United
24 States to you shortly.

25 Second: That the defendant was a party to or

1 member of that agreement.

2 Third: That the defendant you are considering
3 joined the agreement or conspiracy knowing of its objective
4 to defraud the United States or to commit an offense against
5 the United States and intending to join together with at
6 least one other alleged conspirator to achieve one of the
7 objectives; that is, that the defendant and at least one
8 other alleged conspirator shared a unity of purpose and the
9 intent to achieve a common goal or objective, to defraud the
10 United States or to commit an offense against the United
11 States.

12 And, fourth: That at some time during the
13 existence of the agreement or conspiracy, at least one of
14 its members performed an overt act in order to further the
15 objective of the agreement.

16 I will explain each of these elements in more
17 detail.

18 The first element of the crime of conspiracy is
19 the existence of an agreement. The Government must prove
20 beyond a reasonable doubt that two or more persons knowingly
21 and intentionally arrived at a mutual understanding or
22 agreement, either spoken or unspoken, to work together to
23 achieve an overall objective of the conspiracy, to defraud
24 the United States or to commit an offense against the United
25 States, to commit securities fraud, to make false statements

1 in quarterly and annual reports filed with the Securities
2 and Exchange Commission, and to make false statements to
3 the Securities and Exchange Commission and the Federal
4 Reserve.

5 The Government does not have to prove the
6 existence of a formal or written agreement, or an express
7 oral agreement spelling out the details of the
8 understanding. The Government also does not have to prove
9 that all the members of the conspiracy directly met, or
10 discussed between themselves their unlawful objectives, or
11 agreed to all the details, or agreed to what the means were
12 by which the objectives would be accomplished. The
13 Government is not required to prove that all people named in
14 the indictment were, in fact, parties to the agreement, or
15 that all members of the alleged conspiracy were named, or
16 that all members of the conspiracy are known. What the
17 Government must proof beyond a reasonable doubt is that two
18 or more persons in some way or manner arrived at some type
19 of agreement, mutual understanding, or meeting of the minds
20 to try to accomplish a common and unlawful objective.

21 You may consider both direct evidence and
22 circumstantial evidence in deciding whether the Government
23 has proved beyond a reasonable doubt that an agreement or
24 mutual understanding existed. You may find the existence of
25 a conspiracy based on reasonable inferences drawn from the

1 actions and statements of the alleged members of the
2 conspiracy, from the circumstances surrounding the scheme,
3 and from evidence of related facts and circumstances which
4 prove that the activities of the participants in a
5 criminal venture could not have been carried out except
6 as the result of a preconceived agreement, scheme, or
7 understanding.

8 The indictment charges a conspiracy to commit
9 several unlawful objectives, i.e., to defraud the United
10 States, to commit securities fraud, to make false statements
11 in reports filed with the SEC, and to make false statements
12 to the SEC and federal regulators. The Government does
13 not have to prove that the alleged conspirators agreed to
14 commit all of these unlawful objectives. The Government,
15 however, must prove that they agreed to commit at least
16 one of the unlawful objectives, and you must unanimously
17 agree on which unlawful objective. You cannot find a
18 defendant guilty of conspiracy unless you unanimously agree
19 that the same federal crime was the objective of the
20 conspiracy. It is not enough if some of you agreed that one
21 of the charged crimes was the objective of the conspiracy
22 and others agree that a different crime was the objective of
23 the conspiracy.

24 If you find that a criminal agreement or
25 conspiracy existed, then in order to find a defendant guilty

1 of conspiracy, you must also find that the Government proved
2 beyond a reasonable doubt that the defendant knowingly and
3 intentionally joined that agreement or conspiracy during its
4 existence. The Government must prove that the defendant you
5 are considering knew the goal or objective of the agreement
6 or conspiracy and voluntarily joined it during its
7 existence, intending to achieve the common goal or objective
8 and to work together with the other alleged conspirators
9 toward that goal or objective.

10 The Government need not prove that the defendant
11 you are considering knew everything about the conspiracy or
12 that he or she knew everyone involved in it, or that he or
13 she was a member from the beginning. The Government also
14 does not have to prove that the defendant played a major or
15 substantial role in the conspiracy.

16 You may consider both direct evidence and
17 circumstantial evidence in deciding whether the defendant
18 joined the conspiracy, knew of its criminal objective, and
19 intended to further the objective. Evidence which shows
20 that the defendant only knew about the conspiracy, or only
21 associated with other members of the conspiracy, or was only
22 present when it was discussed or when a crime was committed,
23 is not sufficient to prove that the defendant was a member
24 of the conspiracy even if the defendant approved of what was
25 happening or did not object to it. Likewise, evidence

1 showing that the defendant may have done something that
2 happened to help a conspiracy does not necessarily prove
3 that he or she joined the conspiracy. You may, however,
4 consider this evidence, with all the other evidence, in
5 deciding whether the Government proved beyond a reasonable
6 doubt that the defendant joined the conspiracy.

7 In order to find the defendant you are
8 considering guilty of conspiracy, you must find that the
9 Government proved beyond a reasonable doubt that the
10 defendant joined the conspiracy knowing of one of its
11 objectives and intending to help further or achieve that
12 objective.

13 That is, the Government must prove, as to the
14 defendant you are considering: One, that the defendant knew
15 of an objective or goal of the conspiracy; two, that the
16 defendant joined the conspiracy intending to help further or
17 achieve that goal or objective; and, three, that the
18 defendant and at least one other alleged conspirator shared
19 a unity of purpose toward that objective or goal.

20 To convict a defendant of conspiracy to defraud
21 the United States, the Government must prove that the
22 defendant acted with intent to defraud. I have previously
23 instructed you on the definition of intent to defraud.

24 To convict a defendant of conspiracy for
25 committing an identified offense against the United States,

1 the Government must prove whatever mental state is required
2 for conviction of the underlying substantive offenses. The
3 Government has alleged three possible underlying substantive
4 offenses in Count 1: To commit securities fraud, to make
5 false statements in reports filed with the SEC, and to make
6 false statements to the SEC and federal regulators, which I
7 will explain in more detail. Each of these offenses
8 requires that the Government proved beyond a reasonable
9 doubt that the defendant committed the offense knowingly,
10 willfully, and/or with intent to defraud, which I defined
11 for you earlier. I will tell you which mental states apply
12 to the underlying substantive offenses.

13 With regard to the fourth element of
14 conspiracy -- over acts -- the Government must prove
15 beyond a reasonable doubt that during the existence of the
16 conspiracy, at least one member of the conspiracy performed
17 at least one of the overt acts described in the indictment,
18 for the purpose of furthering or helping to achieve the
19 objective of the conspiracy.

20 The indictment alleges the following overt acts
21 committed in furtherance of the conspiracy:

22 Wilmington Trust Corporation filed with the
23 SEC a Form 10-Q for the third quarter of 2009 and the first
24 and second quarters of 2010, as well as a Form 10-K for
25 2009, with each SEC report materially misrepresenting the

1 bank's quantity of loans that were past due for 90 or more
2 days.

3 Mr. Gibson electronically signed Wilmington
4 Trust's SEC Form 10-Q for the third quarter of 2009 and the
5 first and second quarters of 2010, as well as a Form 10-K
6 for 2009.

7 Mr. Harra and Ms. Rakowski electronically signed
8 Wilmington Trust's 2009 Form 10-K.

9 Mr. Gibson also electronically signed a
10 certification in Wilmington Trust's SEC Form 10-Q for the
11 third quarter of 2009 and the first and second quarters of
12 2010, as well as a Form 10-K for 2009 stating that the
13 information contained in each of the reports fairly
14 presented in all material respects the financial condition
15 and results of operation of Wilmington Trust.

16 Mr. Gibson and Mr. Harra further certified
17 falsely in Wilmington Trust's 2009 Form 10-K that the bank's
18 internal controls over financial reporting were effective,
19 when each was aware that the bank had experienced
20 significant issues with the tracking, proper extension, and
21 reporting of matured loans.

22 Wilmington Trust Company filed call reports with
23 the Federal Reserve for each of the third and fourth
24 quarters of 2009, and the first and second quarters of 2010,
25 which each materially misrepresented the bank's quantity of

1 loans that were past due for 90 days or more.

2 Mr. Gibson electronically signed Wilmington
3 Trust's call reports for each of the third and fourth
4 quarters of 2009 and the first and second quarters of
5 2010.

6 Wilmington Trust Corporation filed monthly
7 regulatory reports with the Federal Reserve for each monthly
8 period between September 2009 and March 2010, which, each
9 materially misrepresented the bank's quantity of loans that
10 were past due for 90 or more days.

11 Mr. North supervised the preparation and
12 approval of the past due loan amounts in the bank's monthly
13 delinquency report, knowing that such conduct would cause
14 the bank to materially misrepresent its quantity of loans
15 that were past due for 90 or more days in each of the public
16 reports filed in the following periods: Wilmington Trust's
17 SEC reports for the third quarter of 2009, year-end 2009,
18 and the first quarter of 2010; WTC's call report for each of
19 the third and fourth quarters of 2009, and the first quarter
20 of 2010; and Wilmington Trust's monthly regulatory reports
21 for each monthly period between September 2009 and
22 March 2010.

23 Ms. Rakowski supervised the preparation and
24 approval of the past due reports knowing that the false past
25 due loan information included therein would cause the bank

1 to materially misrepresent its quantity of loans that were
2 past due for 90 or more days in each of the same following
3 periods: Wilmington Trust's SEC reports for the third
4 quarter of 2009, year-end 2009, and the first quarter of
5 2010; WTC's call reports for each of the third and fourth
6 quarters of 2009, and the first quarter of 2010; and
7 Wilmington Trust's monthly regulatory reports for each
8 monthly period between September 2009 and March 2010.

9 Wilmington Trust Corporation submitted false
10 information regarding loans that were 90 days or more past
11 due to the Federal Reserve in advance of its targeted
12 examination in early 2010 (as of date of September 30,
13 2009), and full scope examination in 2010 (as of date
14 May 31st, 2010), and did not otherwise disclose the waiver
15 practice during the course of the Federal Reserve
16 examinations or while operating under the MOU.

17 The Government does not have to prove that all
18 of these acts were committed or any of these acts were
19 themselves illegal. Also, the Government does not have to
20 prove that a defendant personally committed any of the overt
21 acts. The Government must proof beyond a reasonable doubt
22 that at least one member of the conspiracy committed at
23 least one of the overt acts alleged in the indictment and
24 committed it during the time that the conspiracy existed,
25 for the purpose of furthering or helping to achieve an

1 objective of the conspiracy. You must unanimously agree on
2 the overt act that was committed.

3 The Government is not required to prove that any
4 members of conspiracy were successful in achieving any or
5 all of the objectives in the conspiracy.

6 You may find a defendant guilty of conspiracy if
7 you find that the Government proved beyond a reasonable
8 doubt the elements I explained, even if you find that the
9 Government did not prove that any of the conspirators
10 actually committed any other offense.

11 Conspiracy is a criminal offense separate from
12 the offenses that were the objective of the conspiracy.
13 Conspiracy is complete without the commission of those
14 offenses in the

15 As I have instructed you, Count I charges the
16 alleged conspirators entered into an agreement to knowingly
17 accomplish four unlawful objectives.

18 The Government need not prove that the alleged
19 conspirators entered into an agreement to knowingly
20 accomplish all four unlawful objectives.

21 However, the Government must prove beyond a
22 reasonable doubt that the alleged conspirators entered into
23 an agreement to knowingly accomplish at least one of the
24 unlawful objectives charged in Count I.

25 All twelve of you must find the same unlawful

1 objective was agreed upon by the alleged co-conspirators.
2 It is not enough to convict that some of you find that the
3 Government has proven an agreement to knowingly accomplish
4 one unlawful objective, while others of you find that the
5 Government has proven to accomplish a different unlawful
6 objective.

7 If you do not all agree unanimously, that the
8 Government proven beyond a reasonable doubt an agreement to
9 knowingly accomplish the same unlawful objective, you must
10 return a verdict of not guilty for all defendants with
11 respect to Count I.

12 Members of the jury, I think we're about halfway
13 through the instructions. We're going to take a five-minute
14 break so I can rest my throat.

15 And also so you all can walk to the jury room
16 and do whatever you may do to try to make yourself ELERT.
17 You all seem to be pretty ELERT. It's a hard thing to do.

18 But in any event, we'll take a short break.

19 Take the jury out, please.

20 (Jury left the courtroom.)

21 THE COURT: All right.

22 So it really will be a short break. We'll be
23 back in an about five minutes.

24 (A break was held.)

25 THE COURT: All right.

1 We're ready to continue. Let's get the jury.

2 (At this time the jury entered the courtroom.)

3 THE COURT: All right.

4 Members of the jury, welcome back, everyone.

5 You may be seated.

6 I have put in a request to try to lower the
7 temperature in here.

8 Members of the jury, I will now instruct you on
9 the substantive securities fraud count, Count II.

10 Count II of the Indictment alleges that from on
11 or about December 2009, up to on or about February 2010, Mr.
12 Gibson, Mr. Harra, Mr. North, and Ms. Rakowski committed
13 securities fraud.

14 As to each defendant you are considering, the
15 Government must prove each of the following elements beyond
16 a reasonable doubt:

17 One, that the defendant you are considering
18 executed, or attempted to execute, a scheme or artifice.

19 a, to defraud persons in connection with the
20 securities of Wilmington Trust Corporation or,

21 b, to obtain, by means of materially false and
22 fraudulent pretences, representations, and promises, or by
23 statements containing material omissions, money and property
24 in connection with the purchase and sale of the securities
25 of Wilmington Trust Corporation.

1 Two, that the defendant you are considering
2 acted knowingly and with the intent to defraud; and

3 Three, that Wilmington Trust Corporation is an
4 issuer of a class of securities registered under Section 12
5 of the Securities Exchange Act of 1934 (15 U.S.C. Section
6 781) or that it is required to file a report under Section
7 15(d) of the Securities Exchange Act of 1934 (15 U.S.C.
8 Section 78o(d) .

9 A scheme or artifice to defraud in the context
10 of Count II is any plan, device, or course of action to
11 obtain money or property by false or fraudulent pretenses.

12 The Government must prove beyond a reasonable
13 doubt that the scheme contemplated or intended some harm to
14 property rights of another.

15 The requirement is satisfied if you find either
16 the Government proved beyond a reasonable doubt that the
17 defendant intended that other individuals would make
18 investment decisions based on materially fraudulent
19 misrepresentations.

20 You should ignore the word "either" there.

21 The first element that the Government must prove
22 beyond a reasonable doubt is that the defendant you are
23 considering executed a scheme to either:

24 One, defraud investors by making materially
25 false or fraudulent statements in connection with the

1 securities of Wilmington Trust Corporation, or

2 Two, fraudulently obtained money and property in
3 connection with the purchase and sale of the securities of
4 Wilmington Trust Corporation.

5 With respect to one, the Government must prove
6 beyond a reasonable doubt that the defendant you are
7 considering executed, or attempted to execute a scheme or
8 artifice to defraud investors by making materially false or
9 fraudulent statements in connection with the securities of
10 Wilmington Trust Corporation.

11 With respect to two, the Government must prove
12 beyond a reasonable doubt that the defendant you are
13 considering executed, or attempted to execute a scheme or
14 artifice to obtain money by means of materially false or
15 fraudulent pretenses, representations, or promises in
16 connection with the purchase of sales of the securities of
17 Wilmington Trust Corporation.

18 To find the that Government has proven the first
19 element of Count II beyond a reasonable doubt with respect
20 to the defendant you are considering, you must be unanimous
21 that the Government has proven beyond a reasonable doubt
22 that the defendant executed, or attempted to execute either
23 one, a scheme to defraud investors by making materially
24 false or fraudulent statements in connection with the
25 securities of Wilmington Trust Corporation, or, two, a

1 scheme or artifice to obtain money by means of materially
2 false or fraudulent pretenses, representations, or promises
3 in connection with the purchase or sale of the securities of
4 Wilmington Trust Corporation, as discussed above.

5 It is not enough to convict if some of you find
6 that the Government has proven securities fraud under, one,
7 with respect to the defendant you are considering, while
8 others of you find that the Government has proven securities
9 fraud under, two, with respect to that defendant.

10 If you cannot unanimously agree, you must return
11 a verdict of not guilty on Count II for the defendant you
12 are considering.

13 To establish a scheme to defraud, the Government
14 must prove beyond a reasonable doubt that the defendant
15 knowingly devised or willfully participated in a scheme to
16 defraud any person in connection with the securities of
17 Wilmington Trust Corporation.

18 A scheme is merely a plan for accomplishing an
19 object.

20 Thus, a scheme to defraud is any plan, device,
21 or course of action to deprive another of money or property
22 by means of materially false or fraudulent pretenses,
23 representations, or promises reasonably calculated to
24 deceive persons of average prudence.

25 In this case, the indictment alleges that the

1 scheme to defraud was carried out by making materially false
2 or fraudulently statements, representations, claims or
3 documents. The representations which the indictment
4 charges were made as part of the scheme to defraud in Count
5 II are contained in Wilmington Trust's SEC Form 10-K for
6 2009, Government Exhibit 1.

7 It is sufficient that the Government prove
8 beyond a reasonable doubt that one or more of the false or
9 fraudulent material misrepresentations in Wilmington Trust
10 Corporation's SEC Form 10-K for 2009, were made in
11 furtherance of the alleged scheme to defraud.

12 However, you cannot convict the defendant unless
13 you all agree unanimously as to at least one of the material
14 representations.

15 A statement, representation, claim, or document
16 is false if it is untrue when made, and if the person making
17 the statement, representations, claim or document or causing
18 it to be made knew it was untrue at the time it was made.

19 A representation or statement is fraud if it was
20 known to be false and was made with the intention to
21 deceive.

22 In addition, deceitful statements and
23 half-truths, or the expression of an opinion not honestly
24 entertained may constitute false or fraudulent statements.

25 The arrangement of the words, or the

1 circumstances in which they are used, may convey a false and
2 deceptive appearance.

3 The deception need not be premised upon spoken
4 or written words alone. If there is deception, the manner
5 in which it was accomplished is immaterial.

6 The false or fraudulent representations must
7 relate to a material fact or matter.

8 A fact is material if there is a substantial
9 likelihood that a reasonable investor would have viewed the
10 information as having significantly altered the total mix of
11 information available.

12 This means that if you find that a particular
13 statement of facts was false, you must determine whether
14 there was a substantial likelihood that the statement was
15 one that a reasonable investor would have viewed as having
16 significantly altered the total mix of information available
17 in making his or her decision to invest in Wilmington Trust
18 Corporation securities.

19 In order to establish a scheme to defraud, or to
20 fraudulently obtain money or property, the Government must
21 also prove that the alleged scheme contemplated depriving
22 another of money or property.

23 However, the Government is not required to prove
24 that a particular defendant originated the scheme to
25 defraud.

1 Furthermore, it is not necessary that the
2 Government prove that a defendant actually realized any gain
3 from the scheme or that any intended victim actually
4 suffered any loss. Although, whether or not the scheme
5 actually succeeded is really not the question, you may
6 consider whether it succeeded in determining whether the
7 scheme existed.

8 If you find that the Government has proved
9 beyond a reasonable doubt that the scheme to defraud charged
10 in the indictment did exist and that the defendant knowingly
11 devised or participated in the overall scheme charged in the
12 indictment, you should then consider the second element.

13 I instruct you as a matter of law that the term
14 "security" includes stock.

15 I instruct you that Wilmington Trust Corporation
16 was an issuer with a class of securities registered under
17 Section 12 of the Securities Exchange Act 1934, or that was
18 required to file reports under Section 15(d) of the
19 Securities Exchange Act of 1934, during the period set forth
20 in the indictment.

21 A fraud scheme is employed in connection with
22 the purchase or sale of a security if the alleged false or
23 fraudulent statement coincides with the securities
24 transaction. That is, there's a nexus between a materially
25 false or fraudulent statement and the purchase or sale of a

1 security.

2 A false or fraudulent statement is material to
3 the purchase or sale of a security, if there was a
4 substantial likelihood that the truthful disclosure of the
5 alleged false statements regarding past due loans would have
6 been viewed by a reasonable investor as having significantly
7 altered the total mix of information available to that
8 investor.

9 The final element that the Government must prove
10 beyond a reasonable doubt is that the defendant acted with
11 intent to defraud.

12 I have previously instructed you on the
13 definition of intent to defraud.

14 In considering whether a defendant acted with an
15 intent to defraud, you may consider, among other things,
16 whether that defendant acted with a desire to or purpose to
17 bring about some gain or benefit to the himself or herself,
18 or someone else with a purpose to cause some loss to
19 someone.

20 You may also find an intent to defraud if you
21 conclude that a defendant made or caused to be made a
22 material misstatement of fact made with reckless disregard
23 for the truth.

24 In order to establish that a defendant committed
25 securities fraud by making any false or fraudulently

1 representations to obtain money or property in connection
2 with a security, the Government must prove beyond a
3 reasonable doubt the following elements:

4 First, the defendant employed a device, scheme,
5 or artifice:

6 Second, with the purpose to obtain, by means of
7 false or fraudulent pretenses, representations, or promises
8 any money or property:

9 Third, the false or fraudulent pretenses,
10 representations, or promises were made in connection with a
11 security:

12 Fourth, the security was registered under a
13 national exchange or required to file a report under the
14 Securities Exchange Act; and

15 Five, the defendant acted with an intent to
16 defraud.

17 I have previously instructed you as to what
18 constitutes a scheme, device, or artifice. The definition
19 of a security, the definition of a false or fraudulent. The
20 fact that the Wilmington Trust's securities were registered
21 under a national exchange are required to file reports under
22 the Securities Exchange Act. Definition of a materiality in
23 the context of securities fraud and the definition of intent
24 to fraud.

25 Securities fraud by means of false or fraudulent

1 pretenses, representations, or promises requires that you
2 must agree that a defendant engaged in a specific fraud or
3 fraudulent pretenses, representations, or promises.

4 The Government is not required to prove that all
5 of the statements alleged are materially false. Proof that
6 a single statement is materially false is sufficient to
7 prove a defendant's guilt as to Count II.

8 However, each of you must agree with each of the
9 other jurors that the same item is materially false. Unless
10 you unanimously agree that the Government has proved the
11 same item was materially false beyond a reasonable doubt,
12 you must find the defendant is not guilty regarding that
13 count.

14 The only alleged false statements that you may
15 consider in connection with the securities fraud by means of
16 false or fraudulent pretenses, representations, or promises
17 with respect to Count II are the following statements on the
18 SEC Form 10-K for 2009, submitted by Wilmington Trust
19 Corporation, Government Exhibit 1.

20 The Government contends that the following
21 statements on page 55 of the SEC Form 10-K for 2009 were
22 false:

23 One, the table listing the amount of particular
24 categories of loans past due 90 days or more;

25 Two, the ratio of loans past due 90 days to

1 total loans outstanding;

2 And, three, the discussion of accruing loans
3 past due 90 days or more.

4 The three statements identified above on page 55
5 of the Wilmington Trust Corporation SEC Form 10-K for 2009,
6 are the only statements that you may consider with respect
7 to the alleged scheme to obtain money or property by means
8 of materially false or fraudulently pretenses,
9 representations, or promises.

10 The Government need not prove that each
11 statement was false. However, the Government must prove
12 beyond a reasonable doubt that at least one of these
13 statement was materially false and that it was made in
14 furtherance of the alleged scheme to obtain money or
15 property by means of materially false or fraudulent
16 pretenses, representations, or promises.

17 Furthermore, all twelve of you must agree that
18 the statement was materially false. It is not enough if
19 some of you find that the Government has proven one
20 materially false statement, while others of you find that
21 the Government has proven another false statement.

22 If you do not all agree unanimously that the
23 Government has proven the same specific materially false
24 statement beyond a reasonable doubt, you must return a
25 verdict of not guilty for all of the defendants with respect

1 to Count II.

2 Counts IV and VI the indictment charge one more
3 of the defendants with knowingly and willfully making or
4 causing the making of a false statement of material fact in
5 a report to be filed with the Securities and Exchange
6 Commission.

7 Count IV and VI allege that Mr. Gibson, Mr.
8 Harra, Mr. North, and Ms. Rakowski committed the alleged
9 offense.

10 You must consider each count and each defendant
11 individually. As to each count and each defendant you are
12 considering, the Government must prove each of the following
13 elements beyond a reasonable doubt.

14 One, the SEC report at issue in the count you
15 are considering contained a false statement of fact;

16 Two, the statement was material;

17 Three, the defendant you are considering made or
18 caused the statement to be made;

19 And, four, the defendant you are considering
20 acted knowingly and willfully and with the intent deceive or
21 defraud.

22 You must be convinced that the Government has
23 proven all of these elements beyond a reasonable doubt in
24 order to find the defendant you are considering guilty of
25 the count at issue.

1 If you find that the Government has filed to
2 prove any of these elements beyond a reasonable doubt with
3 respect to the defendant you are considering on any count,
4 you must return a verdict of not guilty with respect to the
5 defendant on that count.

6 The first element that the Government must prove
7 beyond a reasonable doubt in Count IV and VI is that the SEC
8 report in the count you are considering contained a false
9 statement of fact.

10 A statement is false if it's untrue when made
11 and if the person making the statement or causing it to be
12 made knew it was untrue at the time it was made.

13 I will now instruct you on the alleged false
14 statements of fact that you must consider for each count.

15 The only statements that you may consider with
16 respect to Count I are the following statements on the SEC
17 Form 10-K for 2009, submitted by Wilmington Trust
18 Corporation, Government Exhibit 1.

19 The Government contends that the following
20 statements on page 55 of the SEC Form 10-K for 2009 were
21 false:

22 One, the table listing the amounts of particular
23 categories of loans past due 90 days or more;

24 Two, the ratio of loans past due 90 days to
25 total loans outstanding and;.

1 Three, the discussion of accruing loans past due
2 90 days or more.

3 The three statements above on the Wilmington
4 Trust Corporation SEC Form 10-K for 2009, are the only
5 statements that you may consider with respect to Count IV.

6 The only statements that you may consider with
7 respect to Count VI are the following statements on the
8 second Form 10-Q for the first quarter of 2010, submitted by
9 Wilmington Trust Corporation, Government Exhibit 5.

10 The Government contends that the following
11 statements on page 88 of the SEC Form 10-Q for the first
12 quarter of 2010 were false:

13 One, the table listing the amounts of particular
14 categories of loans past due 90 days or more;

15 Two, the past due loan ratio; and

16 Three, the discussion of accruing loans past due
17 90 days or more.

18 These three statements are the only statements
19 that you may consider with respect to Count VI.

20 Counts IV and VI of the indictment each allege a
21 number of false statements. The Government is not required
22 to prove that all of the statements that are alleged as
23 false in each count are, in fact, false.

24 However, the Government must prove beyond a
25 reasonable doubt that at least one of the specific

1 statements in each count counsel was false.

2 With respect to each count, all twelve of you
3 must agree beyond a reasonable doubt that the statement was
4 false. It is not enough to convict if some of you find that
5 the Government has proven one false statement charged in
6 Count I, while others of you find that the Government has
7 proven another false statement charged in that count.

8 If you do not all agree unanimously that the
9 Government has proven the same specific false statement
10 beyond a reasonable doubt with respect to count you are
11 considering, you must return a verdict of not guilty on that
12 count.

13 For the conducted charged in Counts IV and VI,
14 the Government must prove beyond a reasonable doubt that the
15 defendant's statements or representation was material.

16 A statement is material if there is a
17 substantial likelihood that a reasonable investor would have
18 viewed the information as having significantly altered the
19 total mix of information available.

20 This means that if you find that a particular
21 statement of fact was false, you must determine whether
22 there was a substantial likelihood that the statement was
23 one that a reasonable investor would have viewed as having
24 significantly altered the total application of information
25 available in making his or her decision to invest in

1 Wilmington Trust Corporation securities.

2 The third element of Count IV and VI that the
3 Government must prove beyond a reasonable doubt is that the
4 defendant you are considering made or caused the alleged
5 false statement to be made.

6 A defendant cannot be held responsible for any
7 false statement in the SEC report that he or she did not
8 make or cause to be made.

9 If the Government proves beyond a reasonable
10 doubt that the SEC report in the count you are considering
11 contained a materially false statement, but the Government
12 fails to prove beyond a reasonable doubt that the defendant
13 you are considering made that statement, or caused that
14 statement to be made in the SEC report, you must find that
15 defendant not guilty on that count.

16 I instruct you as a matter of law that the
17 following documents filed by the Wilmington Trust
18 Corporation with the Securities and Exchange Commission
19 constitute an application, report, or document required to
20 be filed with the Securities and Exchange Commission.

21 The offense of making a false statement in
22 documents required to be filed with the Securities and
23 Exchange Commission charged in the indictment requires that
24 the Government prove that a defendant acted knowingly and
25 willfully in making a false or fraudulent statement.

1 I have previously instructed you on the
2 definitions of knowingly and willfully.

3 I may have to get back to you what I mean by
4 that.

5 To convict on Counts IV and VI, the Government
6 must prove beyond a reasonable doubt that a defendant acted
7 with the intent to deceive or defraud.

8 I previously instructed you on the definition of
9 intent to defraud.

10 To act with the intent to defraud means to act
11 with intent to mislead or to cause a person to believe that
12 which is false.

13 In proving that a defendant acted with the
14 intent to deceive or defraud, the Government is not required
15 to prove that a defendant intended to cause harm to the
16 victim of the fraud.

17 Count V of the indictment alleges that Mr.
18 Gibson, Mr. Harra, Mr. North, and Ms. Rakowski, knowingly
19 and willfully made statements to the Securities and Exchange
20 Commission.

21 Counts XI and XVI of the indictment allege that
22 Mr. Gibson, Mr. Harra, Mr. North, and Ms. Rakowski knowingly
23 and willfully made false statement to the Federal Reserve or
24 the Securities and Exchange Commission.

25 As to each defendant and count you are

1 considering, in order to prove the defendant guilty of the
2 charge charged, the Government must establish beyond a
3 reasonable doubt:

4 First, that the report at issue contained a
5 false, fictitious, or fraudulent statement of fact;

6 Second, that this statement was material;

7 Third, that the defendants made the statement;

8 Fourth, that the defendant you are
9 considering acted knowingly and willfully; and

10 Five, that the statement was made in a matter
11 within the jurisdiction of the Government of the United
12 States.

13 As with all of the charges in the indictment,
14 unless the Government proves each element beyond a
15 reasonable doubt, you must find that the defendant you are
16 considering not guilty on the count you are considering.

17 With respect to Counts V and XI through XVI, the
18 first element that the Government must prove beyond a
19 reasonable doubt is that the statement or representation
20 until the count you are considering was false, fictitious,
21 or fraudulent.

22 A statement or representation is false or
23 fictitious if it was untrue when made, and known at the time
24 to be untrue by the person making it or causing it to be
25 made.

1 A statement is fraudulent if it was known to be
2 untrue when made and was made with the intent to deceive the
3 Government agency to which it was submitted.

4 I will now instruct you on the only statements
5 you may consider with respect to Counts V and XI through
6 XVI.

7 The Government contends that the following
8 statements on page 55 of the SEC Form 10-K for 2009 were
9 false:

10 One, that the table listing the amount of
11 particular categories of loan past due 90 days or more;

12 Two, the ratio of loans past due 90 days to
13 total loans outstanding; and

14 Three, the discussion of accruing loans past due
15 90 days or more.

16 The three statements identified above on the
17 Wilmington Trust Corporation SEC Form 10-K for 2009,
18 Government Exhibit 1, are the only statements that you may
19 considered with respect to Count V.

20 The only statements you may consider with
21 respect to Count XI are the following statements on the
22 Third Quarter 2009 Call Report, Government Exhibit 76.

23 The Government contends that the 90 day past due
24 amounts in line items, one, three, four, and six on page 43
25 of the Call Report are false.

1 It only statements you may consider with respect
2 to Count XII are the following statements on the Four
3 Quarter 2009 Call Report, Government Exhibit 77.

4 The Government contents that 90 day past due
5 loan amounts in line items one, four, and six on page 43 are
6 false.

7 The only statements you may consider with
8 respect to Count XIII are the following statements on First
9 Quarter 2010 Call Report, Government Exhibit 78.

10 The Government contends that the 90 day past due
11 loan amounts in line items one, four, and six, on page 43
12 are false.

13 The only statements you may consider with
14 respect to Count XIV are the following statements on the SEC
15 Form 10-Q for the Third Quarter of 2009, submitted by
16 Wilmington Trust Corporation, Government Exhibit 4.

17 The Government contends that the following
18 statement on page 145 of the SEC Form 10-Q for the Third
19 Quarter of 2009, were false:

20 One, the table listing the amounts of particular
21 categories of loans past due 90 days or more;

22 Two, the past due loan ratio; and

23 Three, the discussion of loans past due 90 days
24 or more.

25 The only statements that you may considered with

1 respect to Count XV are the following statements on the SEC
2 Form 10-Q for the First Quarter of 2010, submitted by
3 Wilmington Trust Corporation, Government Exhibit 5.

4 The Government contends that the following
5 statements on page 88 of the SEC Form 10-Q for the First
6 Quarter of 2010, were false:

7 One, the table listing the amounts of particular
8 categories of loans past due 90 days or more;

9 Two, the past due loan ratio; and

10 Three, the discussion of accruing loans past due
11 90 days or more.

12 The only statements you may consider with
13 respect to Count XVI are the following statements in the
14 Monthly Regulatory Report for October 2009, Government
15 Exhibit No. 243.

16 The Government contends that the 90 days or more
17 past due loan information is false.

18 Counts V XI through XVI of the indictment each
19 allege a number of false statements.

20 The Government is not required to prove that all
21 of the statements that are alleged in a particular count as
22 false are, in fact, false.

23 However, the Government must prove beyond a
24 reasonable doubt that at least one of the specific
25 statements in each count was false.

1 With respect to each count, all twelve of you
2 must agree beyond a reasonable doubt that the same statement
3 was false. It is not enough to convict if you find that the
4 Government has proven one false statement charged in a
5 count, while others of you find that the Government has
6 proven another false statement charged in that count.

7 If you do not all agree unanimously that the
8 Government has proven the same specific false statement
9 beyond a reasonable doubt with respect to the count you are
10 considering, you must return a verdict of not guilty on that
11 count.

12 For the conduct charged in Counts V and XI
13 through XVI, a fact is material if it had a natural tendency
14 to influence or was capable of influencing the action of the
15 decision-making body to which it is directed.

16 This means that if you find that a particular
17 statement of fact was false, you must determine whether that
18 statement was one that a reasonable person might have
19 considered important in making his or her decision.

20 The third element of the Counts V and XI through
21 XVI that the Government must prove beyond a reasonable doubt
22 is that a defendant you are considering made the materially
23 false statement.

24 A defendant cannot be held responsible for any
25 false statement that he or she did not make or cause to be

11:03:41 1 made.

11:03:41 2 If the Government proves beyond a reasonable
11:03:43 3 doubt that the report in the count you are considering
11:03:46 4 contained a materially false statement, but the Government
11:03:50 5 fails to prove beyond a reasonable doubt that the defendant
11:03:51 6 you are considering made that statement or caused it to be
11:03:55 7 made, you must find that defendant not guilty.

11:03:57 8 Counts V and XI to XVI require that the
11:04:03 9 Government prove that the defendants acted knowingly and
11:04:07 10 willfully.

11:04:07 11 I have previously instructed you on the
11:04:10 12 definitions of knowingly and willfully.

11:04:13 13 I hereby instruct you that the Securities and
11:04:18 14 Exchange Commission and the Federal Reserve are part of the
11:04:20 15 executive branch of the United States.

11:04:22 16 You may, therefore, finally find alleged false
11:04:26 17 statements were made within the jurisdiction of those
11:04:27 18 agencies. A statement is made within the jurisdiction of an
11:04:30 19 agency if it covers any matter confided to the authority of
11:04:34 20 that agency.

11:04:35 21 Counts VII through X of the indictment charge
11:04:40 22 that Mr. Gibson, Mr. Harra, Mr. North, and Ms. Rakowski made
11:04:44 23 false entries in Call Reports and a Monthly Regulatory
11:04:48 24 Report.

11:04:48 25 Count VII through X each correspond to different

1 report containing an alleged false entry.

2 In order to prove the defendant you are
3 considering guilty of making a false entry into a bank
4 record, the Government must prove each of the following
5 statements beyond a reasonable doubt with respect to the
6 count you are considering:

7 First, that the defendant made an entry or
8 caused it to be made in the report of the bank as charged in
9 the indictment;

10 Second, that the entry was false as to a
11 material matter at the time that it was made; and

12 Three, that the defendant acted knowingly with
13 the intent to deceive the Federal Reserve.

14 Unless the Government proves each element beyond
15 a reasonable doubt, you must find the defendant you are
16 considering not guilty on that count you are considering.

17 An entry is false if untrue when made. An entry
18 may be false if it records a transaction which did not
19 occur, or fails to record a transaction which did not occur,
20 and should have been accurately recorded, or inaccurately
21 reports or records a transaction.

22 Counts VII through X require that the Government
23 prove that the defendants knew the entry was made was false
24 at the time of the entry.

25 This means that the Government must prove beyond

1 a reasonable doubt that the defendant was conscious and
2 aware of the nature of his or her actions and of the
3 surrounding facts and circumstances, as specified in the
4 definition of the offense charged, and knew that the
5 statement was false.

6 In deciding whether a defendant knew that a
7 particular entry was falsely made, you may consider evidence
8 that about what the defendant said, what the defendant did
9 and failed to do, how the defendant acted, and all the other
10 facts and circumstances shown by the evidence that may prove
11 what was in the defendant's mind at that time.

12 For purposes of Counts VII to X, a fact is
13 material if it had a natural tendency to influence, or was
14 capable of influencing the actions of the Federal Reserve to
15 which it is directed.

16 This means that if you find the particular
17 statement of fact was false, you must determine whether the
18 statement was one that a reasonable person might have
19 considered important in making his or her decision.

20 The first elements of Counts VII to X that the
21 Government must prove beyond a reasonable doubt is that the
22 defendant you are considering made or caused to be made the
23 entry in the report of the bank, as charged.

24 This does not mean that the Government must
25 prove that the defendant physically wrote the entries. It

1 is sufficient to satisfy this element if the Government
2 establishes beyond a reasonable doubt that the defendant you
3 are considering caused the entry to be made.

4 If the Government fails to satisfy its burden of
5 proof on this element, you must enter a verdict of not
6 guilty for the defendant you are considering on the count
7 you are considering.

8 The only statements you may consider with
9 respect to Count VII are the following statements on the
10 Third Quarter 2009 Call Report, Government Exhibit 76.

11 The Government contends that the 90 day past due
12 loan amount in line items one, three, four and six on page
13 43 of the Call Report are false.

14 The only statements you may consider with
15 respect to Count VII are the following statements of the
16 Fourth Quarter 2009 Call Report, Government Exhibit 77.

17 The Government contends that the 90 day past due
18 loan amounts in line items, one, three, four and 6 on page
19 43 are false.

20 The only statements you may consider with
21 respect to Count VIII are the following statements in the
22 First Quarter 2010 Call Report, Government Exhibit 77.

23 The Government contends that the 90 day past due
24 loan amounts in line items one, four and six on page 43 are
25 false.

1 The only statements you may consider with
2 respect to Count VIV are the following statements on the
3 First Quarter Call Report, Government Exhibit No. 78.

4 The Government contends that the 90 day past due
5 loan amounts in line items one, four, and six are false.

6 The only statements you may consider with
7 respect to Count X are the following statements in the
8 Monthly Regulatory Report for October 2009, Government
9 Exhibit No. 243.

10 The Government contends that the 90 or more days
11 past due loan information is false.

12 To act with intent to deceive means to act with
13 intent to mislead or to cause a person to believe that which
14 is false.

15 Counts VII through X allege a number of false
16 entries.

17 The Government is not required to prove that all
18 of the entries that are alleged in a particular count as
19 false are, in fact, false.

20 However, the Government must prove beyond a
21 reasonable doubt that at least one of the specific entry in
22 each count was false.

23 With respect to each count, all twelve of you
24 must agree beyond a reasonable doubt that the same entry was
25 false. It is not enough to convict if some of you find that

1 the Government has proven one false entry charged in a count
2 while others of you find that the Government has proven
3 another false entry charged in that count.

4 If you do not all agree unanimously that the
5 Government has proven the same specific false entry made
6 beyond a reasonable doubt with respect to that count you are
7 considering, you must return a verdict of not guilty on that
8 count.

9 A person may be guilty of an offense because he
10 or she personally committed the offense himself or herself
11 or because he or she aided and abetted another person in
12 committing the offense.

13 A person who has aided and abetted another
14 person in committing an offense is often called an
15 accomplice. The person whom the accomplice aids and abets
16 is known as the principal.

17 In this case, the Government alleges that
18 William North aided and abetted Wilmington Trust
19 Corporation, Robert Harra, and David Gibson in committing
20 Counts IV to XVI as charged in the indictment, and Kevyn
21 Rakowski aided and abetted Wilmington Trust Corporation,
22 Robert Harra and David Gibson in committing Counts VI to XI
23 and XIII to XVI.

24 For these specified offenses, I will refer to
25 Wilmington Trust Corporation, Robert Harra, and David Gibson

1 as to Counts II, IV and IV, and Ms. Rakowski, as principals.

2 In order to find William North or Kevyn Rakowski
3 guilty of these identified offenses because he or she aided
4 and an abetted one or more of the principals in committing
5 these offenses, you must find that the Government proved
6 beyond a reasonable doubt each of the following four
7 requirements:

8 First, that one or more of the principals
9 committed the offenses charged by committing the each of the
10 elements of the offenses charged, as I have explained these
11 elements to you in these instructions. The principals need
12 not have been charged with or found guilty of the offenses.
13 However, as long as you find that the Government proved
14 beyond a reasonable doubt that he or she committed the
15 offense;

16 Second, that the defendant knew that the
17 offenses charged was going to be committed or was being
18 committed by the principal;

19 Third, that the defendant knowingly did some act
20 for the purpose of aiding, assisting, facilitating, or
21 encouraging the principal in committing the specific offense
22 charged and with the intent that the principal commit the
23 specific offenses; and

24 Fourth, that the defendant performed the act in
25 furtherance of the offense charged.

1 The law, therefore, requires that the accomplice
2 must act with the same intent as required of a principal.

3 In deciding whether the defendant had the
4 required knowledge and intent to satisfy the third
5 requirement for aiding and abetting, you may consider both
6 direct and circumstantial evidence, including the
7 defendant's words and actions and the other facts and
8 circumstances.

9 However, evidence that the defendant merely
10 associated with persons involved in a criminal venture, or
11 was merely present, or was merely a knowing spectator during
12 the commission of the offense, is not enough for you to find
13 the defendant guilty as an aider and abettor.

14 If the evidence shows that the defendant knew
15 that the offense was being committed or was about to be
16 committed, but does not also prove beyond a reasonable doubt
17 that it was the defendants's intent and purpose to aid,
18 assist, encourage, facilitate, or otherwise associate
19 himself or herself with the offense, you may not find the
20 defendant guilty of the offense as an aider and abettor.

21 The Government must prove beyond a reasonable
22 doubt that the defendant in some way participated in the
23 offense committed by the principal as something the
24 defendant wished to bring about and to make succeed.

25 To show that the defendant performed an act in

1 furtherance of the offense charged to satisfy the fourth
2 requirement, the Government needs to show some affirmative
3 participation by the defendant which at least encouraged the
4 principal to commit.

5 That is, you must find that the defendant's act
6 did, in some way, aid, assist, facilitate, or encourage the
7 principal to commit the offense.

8 The defendant's act need not further aid,
9 assist, facilitate, or encourage every part or phase or
10 element of the offense charged. It is enough if the
11 defendant's act further aid, assist, facilitate, or
12 encourage only one part or phase or element of the offense.

13 Also, the defendant's acts need not themselves
14 be against the law.

15 Counts II through XVI of the indictment allege
16 that the defendants committed the following offense during
17 the course of the alleged conspiracy:

18 Securities fraud, Count II;

19 Making false statements in documents required to
20 be filed with the Securities and Exchange Commission, Counts
21 IV and VI;

22 Making false statements to the Securities
23 Exchange Commission and the Federal Reserve, Counts V and XI
24 to XVI;

25 Making false entries in banking reports, Count

VII to X.

The Government may prove a defendant guilty of an offense charged in Counts II through XVI by proving that the defendant personally committed that offense.

I will instruct you on the elements of each offense momentarily.

The Government may also prove a defendant guilty of an offense charged in Counts II through XVI offenses based on the legal rule that each member of a conspiracy is responsible for crimes and other acts committed by the other members, as long as those crimes and acts were committed to help further or achieve the objective of the conspiracy and were reasonably foreseeable to the defendant as a necessary or natural consequence of the agreement.

In other words, under certain circumstances, the act of one conspirator may be treated as the act of all. This means that all the conspirators may be convicted of a crime committed by any one or more of them, even though they did not all personally participate in the crime themselves.

In order for you to find a defendant guilty of the offenses charged in Counts II through XVI based on this legal rule, you must find that the Government proved beyond a reasonable doubt each of the following four requirements:

First, that the defendant was a member of the conspiracy charged in the indictment;

11:15:56 1 Second, that while the defendant was still a
11:15:59 2 member of the conspiracy, one or more of the other members
11:16:03 3 of the conspiracy committed an offense charged in Counts II
11:16:05 4 through with XVI, by committing each of the elements of that
11:16:09 5 offense, as I had explained those elements to you in these
11:16:13 6 instructions. However, the other members of the
11:16:15 7 conspiracy need not have been found guilty of, or even
11:16:18 8 charged with the offense, as long as you find the Government
11:16:21 9 proved beyond a reasonable doubt that the other members
11:16:24 10 committed the offense;

11:16:24 11 Third, that the other members of the conspiracy
11:16:27 12 committed the offense within the scope of the unlawful
11:16:29 13 agreement and to help further or achieve the objective of
11:16:33 14 the conspiracy; and

11:16:34 15 Fourth, that the offense was reasonably
11:16:39 16 foreseeable to or reasonably anticipated by the defendant as
11:16:40 17 a necessary or natural consequence of the unlawful
11:16:43 18 agreement.

11:16:43 19 The Government does not have to prove that a
11:16:45 20 defendant specifically agreed or knew that the offense would
11:16:49 21 be committed.

11:16:49 22 However, the Government must prove that the
11:16:51 23 offense was reasonably foreseeable to the defendant, as a
11:16:54 24 member of the conspiracy, and within the scope of the
11:16:57 25 agreement as the defendant understood it.

1 As I have instructed you, in order to prove that
2 the defendant was a member of the conspiracy charged in the
3 indictment, the Government must prove that the defendant
4 knew of an objective of the conspiracy to defraud the United
5 States or to commit an offense against the United States;
6 namely, securities fraud, making false statements in
7 quarterly or annual reports filed with the Securities and
8 Exchange Commission, and making false statements to the
9 Securities and Exchange Commission and the Federal Reserve.

10 The Government must further prove that the
11 defendant intended to join together with at least one or
12 other alleged conspirator to achieve one of these
13 objectives.

14 However, for you to find a guilty defendant of
15 an offense charged in Counts II through XVI based on the
16 rule that each member of a conspiracy is responsible for
17 crimes committed by other members, the Government does not
18 have to prove that the defendant specifically agreed or knew
19 that any specific offense would be committed, as long as the
20 Government proves that the offense was reasonably
21 foreseeable to the defendant, as a member of the conspiracy
22 and within the scope of the agreement as the defendant
23 understood it.

24 Counts XVII through XIV of the Third Superseding
25 Indictment charge that Mr. Gibson knowingly certified

1 falsely that certain periodic reports filed with the
2 Securities and Exchange Commission complied with Section
3 13(A) or 15(d) of the Securities Exchange Act, when Mr.
4 Gibson knew that information contained in the periodic
5 reports did not fairly present, in all material respects,
6 the financial condition of the bank.

7 The periodic reports allegedly containing the
8 false certification were Wilmington Trust's Form 10-Q for
9 the Third Quarter of 2009, Form 10-K for the 2009, and Form
10 10-Q for the First Quarter of 2010.

11 According to the Government, the reason why
12 these certificates were false is that the periodic reports
13 pertaining to each certification did not report certain
14 matured loans that were current for interest payments and in
15 the process of extension as past due, which allegedly
16 resulted in Wilmington Trust failing to fairly represent, in
17 all material respects, the financial condition of the Bank
18 in violation of 18 U.S.C. Section 1350.

19 Section 1350(a) of Title 18 of the United States
20 Code required that each periodic report containing financial
21 statements filed by an issuer with the Securities and
22 Exchange Commission pursuant to Section 13(a) or
23 15(d) of the Securities Exchange Act be accompanied by a
24 written statement by the chief executive officer and chief
25 financial officer of the issuer.

1 Section 1350(b) of Title 18 of the United States
2 Code provides that the written statement certify that it
3 accompanying periodic report fully comply with the
4 requirements of Section 13(a) or 13(d) of the Securities
5 Exchange Act and that information contained in the periodic
6 report fairly presents, in all material respects, the
7 financial condition and results of operations of the issuer.

8 Section 1350(c) (1) of Title 18 of the United
9 States Code provides that whoever certifies the written
10 statement knowingly that the accompanying periodic report
11 does not comport in all the requirements set forth in this
12 section shall be guilty of a crime.

13 Mr. Gibson is charged with more than one
14 offense. Each offense is charged in a separate count of the
15 Third Superseding Indictment.

16 The number of offenses charged is not evidence
17 of guilt, and this should not influence your decision in any
18 way. You must separately consider the evidence that relates
19 to each offense, and you must return a separate verdict for
20 each offense.

21 For each offense charged, you must decide
22 whether the Government has proved beyond a reasonable doubt
23 that Mr. Gibson is guilty of that particular offense,
24 meaning that the Government has proved beyond a reasonable
25 doubt each element of that particular evidence.

1 You verdict on one count should not control your
2 verdict on any other count.

3 Mr. Gibson is charged in Counts XVII through XIV
4 of the Third Superseding Indictment with knowingly making
5 materially false certifications in financial reports.

6 To meet its burden of proof on Counts XVII
7 through XIV, the Government must prove as to each count of
8 the following five essential elements beyond a reasonable
9 doubt.

10 If the Government fails to prove any essential
11 element beyond a reasonable doubt, you must return a verdict
12 of not guilty on that count you are considering.

13 The five essential elements are:

14 First, that Mr. Gibson was the chief executive
15 officer, chief financial officer, or the equivalent of
16 Wilmington Trust Corporation; and

17 Second, that Wilmington Trust Corporation was an
18 issuer of securities regulated by the Securities Exchange
19 Act; and

20 Third, that Mr. Gibson certified that the
21 information contained in the Wilmington Trust Corporation's
22 periodic report to which the count pertains, fully complied
23 with the requirements of Section 13(a) or 15(d) of the
24 Securities Exchange Act of 1934, and fairly presented, in
25 all material respects, the financial condition and results

of operations of Wilmington Trust Corporation; and

Fourth, that this certification was materially false; and

Fifth, that Mr. Gibson knew at the time that the certification was made that the certification was materially false.

If the Government has failed to prove any of these elements beyond a reasonable doubt, you must return a verdict of not guilty on the count you are considering.

The first essential element of Counts XVII through XIV is that the Government must prove beyond a reasonable doubt that Mr. Gibson was the chief executive officer, chief financial officer, or the equivalent, of Wilmington Trust.

The second essential element of Counts XVII through XIV that the Government must prove beyond a reasonable doubt is that the Wilmington Trust Corporation was an issuer of securities regulated by the Securities Exchange Act.

I instruct you that the issuers of securities includes every person, including a corporation, who issues or proposes to issue any security.

The term security includes stock.

The third essential element of Counts XVII through XIV that the Government must prove beyond a

1 reasonable doubt is that Mr. Gibson certified that the
2 information contained in the Wilmington Trust Corporation's
3 periodic report to which that count pertains, fully complied
4 with the requirements of Section 13(a) or 15(d) of the
5 Securities Exchange Act of 1934.

6 And, two, fairly presented, in all material
7 respects, the financial condition and results of operations
8 of Wilmington Trust Corporation.

9 The periodic reports at issue are as follows:

10 Count 17, Wilmington Trust Form 10-Q filed
11 11/09.

12 Count 18, Wilmington Trust Form 10-K filed
13 2/22/10.

14 Count 19, Wilmington Trust Form 10-Q filed
15 5/10/10.

16 I further instruct you that Section 1350 of
17 Title 18 of the United States Code requires that an issuer's
18 quarterly and annual reports, SEC Forms 10-Q and 10-K
19 respectively be accompanied by a written certification by
20 the issuer's chief financial officer, that to those reports
21 complied with Section 13(a) or 15(d) of the Securities
22 Exchange Act in all material respects.

23 The fourth essential element of Counts XVII
24 through XIV that the Government must prove beyond a
25 reasonable doubt is that the certification made by Mr.

1 Gibson was materially false. Whether a
2 certification was materially false, must be determined at
3 the time it was made.

4 The Government contends that the certifications
5 in Counts XVII through XIV were false because loans that
6 were matured, current for interest payments, and in the
7 process of extensions, were past due and were required to be
8 reported as past due pursuant to either Section 13(a) or
9 15(d) of the Securities Exchange Act.

10 Whether a certification was materially false
11 must be determined at the time it was made; the
12 certification may not be considered false merely because
13 subsequent events prove it to be erroneous.

14 With respect to the phrase "in all material
15 respects," please use the definition of materiality that was
16 given in connection with Count II, i.e., information is
17 material only if there is a substantial likelihood that a
18 reasonable investor would have viewed the information as
19 having significantly altered the total mix of information
20 available.

21 This means that if you find that a particular
22 statement of fact was false, you must determine whether
23 there was a substantial likelihood that the statement was
24 one that a reasonable investor would have viewed as having
25 significantly altered the total mix of information available

1 in making his or her decision.

2 In fifth essential element of Counts XVII
3 through XIV that the Government must prove beyond a
4 reasonable doubt is that at the time the certification was
5 made, Mr. Gibson knew that the certification was false.

6 It also means that the Government must prove
7 beyond a reasonable doubt that Mr. Gibson was conscious and
8 aware that the periodic report to which that count pertains,
9 did not comply with the requirements of Section 13(a) or
10 15(d) of the Securities Exchange Act of 1934, and the
11 information contained in the periodic report did not fairly
12 present, in all material respects, the financial condition
13 and results of operations of f Wilmington Trust.

14 The Government must prove that Mr. Gibson made
15 the certification voluntarily and intentionally, conscious
16 and aware that the certification was false, and not because
17 of mistake or accident or any other innocent reason.

18 An honest or good faith belief by Mr. Gibson
19 that the certification was accurate, meaning an honest or
20 good faith belief by Mr. Gibson that loans that were
21 matured, interest- current, and in the process of extension
22 were not past due, and were not required to be reported as
23 past due, is a complete defense to this charge.

24 It is a complete defense to this charge even if
25 Mr. Gibson's good faith belief were mistaken or incorrect.

1 The meaning of good faith is as I defined it
2 before.

3 In deciding whether Mr. Gibson acted knowingly,
4 you may consider evidence about what Mr. Gibson said, what
5 Mr. Gibson did and failed to do, how Mr. Gibson acted, and
6 all other facts and circumstances shown by the evidence that
7 may prove what was in Mr. Gibson's mind at that time.

8 Members of the jury, there are another four
9 pages. I will read them to you after you hear the closing
10 arguments. There is no reason to read ahead on what the
11 lawyers will be arguing.

12 So we're going to take a 15 minute break.

13 The plan is this.

14 We're going to go until about 1:00 o'clock.

15 On what the lawyers told me, I expect the
16 Government's argument, since they go first, is going to last
17 longer than before 1:00 o'clock.

18 So they'll go to then. We'll break an hour for
19 lunch. We'll come back and they'll continue.

20 That's the plan.

21 Can we take the jury out and have a 15-minute
22 break here?

23 (The jury was excused for a short recess.)

24 THE COURT: All right. So it occurs to me
25 that -- you can be seated -- that on page 69, the following

1 documents, they're the 10-Q and the 10-K. Right?

2 MR. NOWAK: Right.

3 MR. KRAVETZ: Yes, Your Honor.

4 THE COURT: I think once upon a time the
5 instruction about the 10-Q and 10-K followed this
6 instruction and we moved it up front because I thought that
7 is logically more where it went. So when they come back, I
8 will just tell them that that is what I meant there. All
9 right?

10 MR. WOOD: Yes.

11 THE COURT: Anything else?

12 MR. KRAVETZ: No, Your Honor.

13 MR. WOOD: No Your Honor.

14 THE COURT: All right. We'll take a 15-minute
15 break.

16 (Short recess taken.)

17 - - -

18 (Proceedings resumed after the short recess.)

19 THE COURT: All right. Is everyone ready?

20 MR. KRAVETZ: Yes, Your Honor.

21 THE COURT: All right. Let's get the jury.

22 Mr. Kravetz, so you choose the time like within
23 plus or minus five minutes of 1:00 o'clock. Okay?

24 MR. KRAVETZ: Yes, Your Honor.

25 (The jury entered the courtroom.)

11:46:57 1 THE COURT: All right, members of the jury.

11:47:27 2 Welcome back. Everyone, you may be seated.

11:47:29 3 Members of the jury, you may recall that there
11:47:31 4 was one instruction I stumbled over, which had to do with
11:47:35 5 Counts 4 to 6, and it appears at page 69, where I was
11:47:40 6 talking about some documents that constituted application,
11:47:44 7 the documents required to be filed with the Securities and
11:47:47 8 Exchange Commission. It was supposed to say, "And those two
11:47:50 9 documents are the 10-Q and the 10-K." So that's what that
11:47:54 10 was about.

11:47:55 11 All right. Mr. Kravetz?

11:47:57 12 MR. KRAVETZ: Thank you, Your Honor. May it
11:47:59 13 please the Court, counsel. Good morning, ladies and
11:48:02 14 gentlemen.

11:48:04 15 The evidence has shown beyond all reasonable
11:48:07 16 doubt that the defendants caused Wilmington Trust to lie
11:48:11 17 about its past due loans, that the defendants knew what they
11:48:15 18 were doing was wrong, and that the lie mattered.

11:48:20 19 The lie mattered because it delayed the Federal
11:48:23 20 Reserve from finding out the bank's true condition, and it
11:48:27 21 mattered because the public invested over \$280 million based
11:48:32 22 on that lie. And when it comes down to it, that's what this
11:48:37 23 case is about. It's not about complex banking theories.
11:48:40 24 It's something much more simpler than that, the defendants'
11:48:44 25 failure to tell the truth.

1 Now, we've been together for several weeks.

2 You've heard from a number of witnesses. You've had a
3 chance to review a number of pieces of evidence, and the
4 goal today is to go through that witness testimony, to go
5 through the evidence, and to see how it relates to the
6 defendants, both individually and collectively.

7 And so where I would like to begin is, because
8 this is important with respect to all of the counts in the
9 indictment, is what was happening at Wilmington Trust in the
10 third quarter of 2009, which was the beginning of the
11 charged conduct.

12 We've heard from multiple witnesses, probably
13 every single witness, that the third quarter of 2009 was the
14 midst of the Great Recession. We were also, the bank was
15 also in the aftermath, a very critical Federal Reserve
16 examination, and we'll talk about that and some of the very
17 relevant findings.

18 And, third, there was an entire group of
19 commercial loans that were made in 2004 to 2006 that were
20 coming due.

21 I will start first with certain relevant
22 statistics, and this is from the bank's Form 10-K for 2009.
23 You heard testimony about the growth of Wilmington Trust's
24 commercial loan portfolio, and that's reflected in its
25 public filings. And you can see in 2005, Wilmington Trust's

1 total loans amounted to \$7.4 billion. That number went up
2 to \$8.9 billion, or roughly 9 billion by 2009. And there
3 was significant growth relating to commercial loans. In the
4 three-year, or the two-year period between 2007 and 2009,
5 commercial loans grew from \$5.6 billion to \$6.7 billion. So
6 \$1.1 billion in growth in commercial loans during that time
7 period. The bank was also making a lot of interest income
8 off of the loans that it made during the boom period. And
9 you can see that reflected in the Form 10-K as well where
10 net interest income rises from \$500 million in 2005 to
11 \$720 million in 2007 before it starts declining.

12 What else do we know from the evidence? That at
13 or around the period of the third quarter of 2009, home
14 builders were struggling and home sales were declining, and
15 that's borne out by the bank's over internal statistics.

16 We saw when Margery Stuart testified that there
17 was a document that was circulated throughout the bank
18 showing certain statistics relating to the housing market,
19 and this is just an example, and this is from Government's
20 Exhibit 937-A. But as you can see in 2008, you have a
21 drastic decline in building permits. There's just a
22 stalling in the market in terms of building homes. And the
23 graph is particularly striking. Look at the high point in
24 2005, 25,000-plus total permits within the area. That goes
25 down to 8,200 in 2009. The economy was stalled. Home

1 prices also declined.

2 Now, you can review the exhibit, but the
3 particular enlargement here is showing in the first line the
4 decline in the median sales price in New Castle County by
5 approximately \$43,000 from 2008 to 2009. In Kent County,
6 there was a decline of about 25,000. And in Sussex and down
7 by the beach area, almost \$50,000. So this is the
8 information that is relevant at or around the third quarter
9 of 2009. Every relevant housing statistic is going in the
10 wrong direction. Units sold are down. Units listed are
11 down. The sales price is down. The days on the market is
12 going up because it's much more difficult to sell a home.
13 Active listings are going down, and the supply in months,
14 because we have more houses that can't be sold, that's going
15 up as well.

16 You also saw an exhibit that was originally sent
17 by Mr. Terranova to Mr. Bailey talking about specifically
18 the impact on the Delaware economy on residential home
19 builders, and that was at Exhibit Number 405. And if you
20 recall the e-mail from Mr. Bailey back to Mr. Terranova, he
21 indicated that the information they were getting back from
22 appraisals had the "near term potential for catastrophic
23 consequences."

24 Now, that particular document, particular
25 e-mail, was forwarded by Mr. Bailey to Mr. Harra in the

1 beginning part of April of 2009, where he writes, surprise,
2 surprise. The values are coming back lower. It's mark to
3 market where there is no market. And that e-mail is
4 important because it's an early warning sign to defendant
5 Harra, the president of the bank, and at the time the person
6 in charge of all regional banking activities that the bank
7 would have difficulties properly extending loans because the
8 appraised values are coming back significantly lower.

9 The second item I mentioned was the highly
10 critical 2009 Federal Reserve examination. This was a
11 seismic shift in the world of Wilmington Trust, and the
12 timing is interesting because it coincides with that last
13 e-mail that we saw from April of 2009. As Mr. Corkery and
14 Mr. Fomunyan testified, the examination began in April of
15 2009 and concluded in August, and it was based on loan
16 information from March of 2009.

17 The examination did not go well for Wilmington
18 Trust. The Federal Reserve rated the condition of
19 Wilmington Trust Corporation less than satisfactory, and
20 highlighted certain prominent supervisory concerns,
21 including management's failure to properly identify and
22 control asset quality problems in a timely manner, the
23 failure to identify problem loans, and the use of
24 inappropriate controls and reporting structures.

25 The Fed also rated Wilmington Trust Company,

11:55:39 1 which is the Delaware banking subsidiary, less than
11:55:42 2 satisfactory, and highlighted a significant deterioration in
11:55:48 3 the quality of the bank's loan and security portfolio, weak
11:55:52 4 credit administration, and noted that the current economic
11:55:57 5 environment, the Great Recession, that that brought to the
11:56:00 6 forefront inherently weak credit risk management processes
11:56:06 7 and noted that the bank had a considerably high risk
11:56:09 8 profile.

11:56:09 9 Specifically, the Federal Reserve found that the
11:56:17 10 bank's asset quality was less than satisfactory and provided
11:56:23 11 statistics of what had happened over the last
11:56:25 12 year-and-a-half period, noting that the rate in downgrades
11:56:30 13 within the portfolio over the past 15 months was "alarming,
11:56:36 14 and a key supervisory concern." And they noted that with
11:56:40 15 respect to certain statistics, there was a good indication
11:56:44 16 that the level of problem loans will increase. The bank and
11:56:49 17 the defendants were placed on notice that there was a
11:56:52 18 problem relating to certain loans within the portfolio.

11:56:56 19 The Federal Reserve also criticized credit risk
11:57:04 20 management practices at the bank, and in particular, there
11:57:11 21 were four deficiencies that were noted.

11:57:13 22 First, a credit culture that seeks to serve the
11:57:16 23 client first, rather than emphasizing loan quality.

11:57:19 24 And you heard some of that in the testimony of
11:57:23 25 Marty Infanti and Joseph Terranova, talking about how within

1 the Delaware market, the bank was starting to reach for
2 other low tier borrowers in order to grow the loan
3 portfolio.

4 Second, a credit policy that is not commensurate
5 with the complexity of lending activities.

6 Third, a weak underwriting and ineffective
7 credit administration process.

8 That is also supported by testimony of certain
9 witnesses that you heard from, like Marty Infanti, who
10 talked about when he and others in his division were going
11 through and risk rating loans, that they were finding a
12 number of issues with respect to what they were reviewing in
13 terms of missing documents, stale appraisals, and improper
14 loan approvals.

15 If you recall the one e-mail from Mr. Infanti
16 where he said, the horse is not only out of the barn, but
17 running down the road, that was a specific e-mail that is
18 relating to problems with the credit administration process.

19 And finally, an understaffed loan review
20 function that lacks independence.

21 Now, there was testimony that following the
22 examination, that the bank hired more people, and was able
23 to get a better review of loans that they were risk rating
24 on the portfolio, but even those staffing changes weren't
25 enough to keep Mr. Infanti, who ultimately left is the bank.

1 The examination also highlighted problems with
2 working capital lines of credit and the use of interest
3 reserves. And if you recall, Mr. Fomunyan testified about
4 this first specific finding, which was the tendency at the
5 bank to extend multiple working capital loans or lines of
6 credit and interest reserves. And if you remember
7 Mr. Fomunyan gave an analogy to you of the use of credit
8 cards, where if you have one credit card and have trouble
9 paying and then get a second credit card to pay down the
10 first and then it snowballs into a third and a fourth, that
11 was the analogy that Mr. Fomunyan provided with the same
12 type of lending that was happening in the commercial
13 context.

14 The Fed also cited that there was falling home
15 prices and an oversupply of housing units, which should not
16 have been a surprise given that the internal information was
17 consistent.

18 The Fed also found that there were mothballed
19 projects that were highly dependent on a rebound in the
20 market. And Mr. Fomunyan gave an example of the Harrington
21 lending relationship in Western Sussex County, where
22 properties were mothballed. That is, no one could buy the
23 homes in the particular areas for the prices that they were
24 being sold for, and the only thing that could bring those
25 specific developments back would be if there was a rebound

1 in the housing market that had not happened during that time
2 period. And all of this is linked to the potential to mask
3 delinquency levels in past due loans.

4 So the Federal Reserve in the summer of 2009 is
5 having -- making specific findings that these types of
6 lending practices, lending working capital lines of credit
7 to homebuilders, using loan proceeds from one loan to pay
8 off another, that they could mask delinquency levels and the
9 specific charged conduct in the indictment.

10 What the Federal Reserve found as part of its
11 examination should not have been a surprise to the
12 defendants. And if you recall, in January of 2009,
13 Mr. Gibson sent an e-mail to all three of the defendants as
14 well as other bank employees with the subject, KPMG. And it
15 states that, John just gave me the current status of their
16 review of the interest reserve issue. He first said that he
17 looked for guidance and found nothing definitive other than
18 some references to be very cautious when capitalizing
19 interest. Cut to the chase.

20 And then the second part that's enlarged states,
21 "He admitted he starts with the premise that capitalized
22 interest is not good, and any time a second extension is
23 made should be an immediate red flag."

24 So even prior to the Federal Reserve coming on
25 the scene in April of 2009, the bank's own auditor had

1 identified the use of second extensions as an immediate red
2 flag.

3 As a result, the bank was forced to change its
4 policies, and you saw an e-mail in or around April of 2009
5 that notes that the bank was making changes with respect to
6 certain lending practices. And what's the response from
7 defendant Harra, who is the president of the bank and head
8 of regional banking? He says, "So what I am referring to
9 here are the issues we debated with the Grand Inquisitors
10 during the Inquisition. I thought we debated our points
11 with Depman and were going to set them out here. What am I
12 missing here or did we decide to roll over and no one told
13 me?"

14 And then at the top, the response from Mr.
15 North, where he states that, open-ended, that is not
16 project-related lines to commercial real estate developers,
17 are not something that we're looking to push.

18 So it's an awareness that the defendants, two of
19 the leaders of the bank, are aware of specific problems with
20 the practice and that they had changed their policies
21 accordingly.

22 The Federal Reserve also made findings relating
23 to the ten percent rule. And you've heard a lot of
24 testimony about the ten percent rule, which was a rule that
25 only applied to borrowers who had \$5 million or more worth

1 of loans at the bank. It did not apply to everyone, only to
2 a unique category of borrowers.

3 And it was also used, as you heard through the
4 testimony, to support the riskiest types of loans within
5 the bank's portfolio, commercial real estate construction
6 loans.

7 And so what the Federal Reserve found was that
8 the use of the ten percent rule "created undue repayment
9 risk for the bank." And there's an indication that
10 management indicated that the issue was addressed during the
11 examination. We heard from Mr. Fomunyam, it was not. When
12 the Federal Reserve came back in 2010, the ten percent rule
13 still existed, and it only ended when the Federal Reserve
14 required the bank to eliminate it.

15 Now, just like with issues relating to working
16 capital lines of credit, the identification of ten percent
17 rule loans as a problem should not have been a surprise to
18 the defendants. In fact, other bank employees were talking
19 about abuses or potential abuses of the ten percent rule
20 many months earlier.

21 And so during trial, when Stephen Cummings
22 testified, he was shown an e-mail from September 2008, which
23 he sent to, among other people, Mr. North and Mr. Brewer,
24 where Mr. Cummings is specifically referencing an internal
25 report prepared by the bank that captures the list of all

1 the ten percent rule loans.

2 If you recall, Mr. Terranova testified that,
3 yes, he was making a number of ten percent rule loans. Yes,
4 what he did was illegal, but that certainly, there was the
5 ability for other people within the bank to know about the
6 ten percent rule loans that were made. And what this e-mail
7 demonstrates is, that's exactly right, because here, in
8 September of 2008, Mr. Cummings is writing about the ten
9 percent rule list, and he's noting specifically that there
10 were ten percent rule loans that were made very close to the
11 loan committee process.

12 If you remember, that's one of the reasons why
13 Mr. Terranova pled guilty, because he broke the law by using
14 the ten percent rule after he had represented different
15 things to the loan committee at the time that the loan was
16 approved.

17 So here, Mr. Cummings is looking into the issue
18 and sending an e-mail to Mr. North in September of 2008,
19 one year before the Federal Reserve examination report comes
20 out, and he notes that it is also uncertain whether the
21 rapid use of the approval methodology represent any
22 inappropriate activity, although a closer look at the
23 approvals done 24 hours after committee may warrant closer
24 inspection to ensure that they do not.

25 Now, as we make our way through all the various

1 arguments of counsel in closing arguments, you might hear a
2 lot of blame placed on what happened at the bank on Mr.
3 Terranova and Mr. Bailey, and certainly, Mr. Terranova
4 deserves some of that blame, and he pled guilty and he told
5 you all about it.

6 But keep in mind, ladies and gentlemen, when you
7 hear that argument, that bank personnel had all the
8 information about what Mr. Terranova was doing back in 2008
9 and 2009, and there were no complaints about Mr. Terranova
10 in 2005 and 2006, when he was the golden boy at Wilmington
11 Trust and had nearly \$500 million worth of loans.

12 And so you can see when the ten percent approval
13 list comes out, all of the various, and it's not just Bailey
14 and Terranova, but there are other lenders that are using
15 the ten percent rule as well. But important here is, this
16 is information that is open and available as to what they
17 are doing, the types of loans that they're making, and this
18 is September of 2008, and Mr. Terranova isn't fired until
19 May of '10, or asked to resign in May of '10.

20 I mentioned the horse is out of the barn e-mail
21 earlier. It comes from this e-mail that is displayed, which
22 is referencing a lending relationship known as Cabbage
23 Corner. And Mr. Infanti testified about the relationship
24 and went through the e-mail. But important here is Ms.
25 Thuresson, who is Mr. Infante's boss, is writing about

1 Cabbage Corner in May of 2009 and talking about some very
2 specific problems in the way that the loans were made with
3 respect to this lending relationship. And she notes,
4 between this issue and the myriad ten percent rule issues
5 being seen by my team, I'm beginning to have difficulty
6 quashing concerns about the integrity of the lending
7 process. Again, this is all information that's available
8 even before the Federal Reserve issues its findings relating
9 to the ten percent rule.

10 The Fed also made findings relating to
11 noncompliance with bank policies, practices, and procedures.
12 And if you recall, Mr. Fomunyan talked about this finding as
13 well during his testimony. And if you look at the numbers,
14 it's pretty amazing. The Federal Reserve notes that in the
15 first half of 2009, just the first six months of 2009, there
16 were more than double the policy and practice violations
17 than the entirety of 2008 combined, more than double just in
18 the first six months. And in that context, it makes sense
19 given what was happening within the economy and the fact
20 that a lot of loans were starting to come due within the
21 portfolio.

22 And specifically, with respect to policies, if
23 you recall, you heard from witnesses that bank policies are
24 the roadmap for lending. That's how Mr. Fomunyan described
25 them.

1 Mr. Cummings, Steve Cummings, who was
2 essentially the keeper of the bank policies at Wilmington
3 Trust, testified the policies were supposed to be as strict
4 as federal lending regulations, and he said that bank
5 policies were important, because that is the expectation of
6 the regulators. And so here, when the Fed comes in during
7 the 2009 examination, they are finding significant issues
8 relating to the bank's compliance with its own policies.

9 These issues are linked to past due loans and to
10 the question that you have before you, which is whether the
11 defendants caused the bank to lie about its amount of 90-day
12 past due loans. And so the Federal Reserve writes that
13 while the bank's delinquency ratios are below peer group
14 averages, it was observed during the examination that an
15 inordinate number of loans have interest reserves and/or
16 working capital lines of credit that may be masking the
17 severity of the problem loans in the portfolio.

18 Mr. Fomunyan testified that all of these issues
19 that were identified in the asset quality portion of the
20 report, that he specifically addressed them during loan
21 discussions with the lenders and Mr. North.

22 You heard Mr. Corkery testify that all of the
23 examination findings were shared in an exit meeting with
24 Mr. Gibson, Mr. Harra, and other members of bank leadership,
25 and then they were enshrined in an examination report that

1 came out on September 4th of 2009.

2 We will also see it later, but if you recall,
3 near one of the last days of trial, we introduced a letter
4 from the Federal Reserve that was found in Ms. Rakowski's
5 desk files that highlighted many of the same issues that the
6 Federal Reserve found in connection with the 2009
7 examination, and that will be in the slide a little bit
8 later in the presentation.

9 So what happens as a result of the Federal
10 Reserve's 2009 full scope examination? The Federal Reserve
11 mandates that the bank enters into a memorandum of
12 understanding, which is an informal enforcement action that
13 had a number of provisions.

14 Important for our purposes, one of those
15 provisions was the following, paragraph 15-C. Within
16 20 days of the end of each month, Wilmington Trust and the
17 bank will provide to the reserve bank and the OSBC:

18 Month-end past due and nonaccrual loan reports.

19 So as you keep the timing of the certain
20 sequence of events in mind, that is important, and this is
21 October 21st of 2009, and for the very first time, the bank
22 is going to have to provide past due information on a
23 monthly, not a quarterly basis, and more importantly, it has
24 to go to the Federal Reserve, and it has to be truthful and
25 accurate.

1 That brings us to the waiver practice. And the
2 way that you can think about the waiver practice based on
3 the context of the evidence that has come in throughout the
4 case is the waiver practice starts out as a little white
5 lie. The waiver practice was always wrongful, and you'll
6 see certain slides about it. And it was wrongful because it
7 didn't comport with the applicable regulations in terms of
8 reporting past due loans.

9 But early on, the numbers were much smaller, the
10 impact was much lower, and over time, the waiver practice
11 snowballs, and it turns from this little white lie into what
12 is later described by defendant North in an e-mail as the
13 matured loans beast. Now, when I say the waiver practice
14 was always a problem, don't take my word for it. That was
15 the defendants' understanding of it.

16 This is Government's 418, which you will see
17 quite a bit today, and you will see that three different
18 bank employees in January of 2010 referred to the waiver
19 practice as, first, a decades old issue. That was Mr.
20 North. Second, a decades old problem. That is Mr. Conway.
21 And, third, a longstanding problem. That is Ms. Thuresson.
22 Decades old, longstanding. And these are bank employees who
23 are talking about the waiver practice at a time when they
24 probably don't think that someone is going to be looking at
25 their e-mails seven or eight years later. That is how they

1 described the waiver practice.

2 We also heard testimony and saw an e-mail
3 relating to, what was the original basis for the waiver
4 practice? And it's Government's Exhibit 417, and it's an
5 e-mail from Wayne Irwin to, among other people, Bill North.
6 And Wayne Irwin describes it to Mr. North as the original
7 concept of waiving loans is no longer an issue. The
8 original process of waiving loans started due to the
9 nonpayment between Wilmington Trust and Wilmington Trust of
10 Pennsylvania and Wilmington Trust FSB participation banks,
11 participation loans.

12 And then Mr. Irwin notes, now we have the task
13 of taking away the crutch of waiving loans for the matured
14 loans.

15 Mr. Conway responds and indicates that this is
16 something that he's going to bring up at the Mid-Atlantic
17 market meeting the following week. And we will see some
18 agenda items from Mid-Atlantic market meetings later, but
19 this was a meeting that Mr. Conway testified was always
20 chaired by Mr. Harra, because he was the head of regional
21 banking at Wilmington Trust.

22 Now, I said before that you can infer that when
23 the waiver practice began, it was like the little white lie
24 at the bank. Evidence introduced by the defendants proves
25 that point. And so the defendants introduced a version of

1 the past due report from September of 1999, and it was for
2 the purpose of showing that the waiver practice had existed
3 for a long period, at least ten years before the charged
4 conduct.

5 But if you recall, we were able to sort that
6 information and demonstrate that in September 1999,
7 ten years before the conduct alleged in the indictment,
8 there was only one 90-day past due loan waived as current
9 for interest, extension in process, totaling \$1.08 million.
10 You will see that that number. The number of loans and the
11 amount gets much, much higher as time goes on.

12 Defendants also introduced a former past due
13 early warning report from June of 2006, so now we're about
14 seven years later. Let's see what happened with respect to
15 the 90-day past due loans that were waived. There were nine
16 of them. That's it. Nine loans that were past due for
17 90 days or more and waived as current for interest in the
18 process of extension, only \$2.7 million.

19 But in terms of the waiver practice being a
20 problem even though the numbers weren't as high as they
21 eventually rose to at the end of 2009 and into 2010,
22 defendant North realized that the waiver practice was a
23 problem. And you saw a number of e-mails that defendant
24 North would write at quarter end when the delinquency report
25 was being passed out to other people within the lending

1 function.

2 So the first example, an e-mail from Mr. North,
3 March of 2007, where he notes, the number of waived matured
4 loans has been too high over the last four quarters, going
5 back to March of 2006.

6 He notes further, in order to avoid that
7 becoming an issue with examiners, audit or executive
8 management, I like to think that we can help ourselves by
9 getting this under control.

10 Another example. November of 2008, a few months
11 later, or actually, a year and a few months later, Mr. North
12 attaches a version of the past due report and he notes that
13 while this is an off quarter end month, the concern is that
14 such a level of matured facilities could be viewed as a
15 serious administrative weakness. At many banks, you can't
16 advance under a matured facility. If we move in that
17 direction, we'd have major issues based on how we've been
18 handling these historically.

19 And if you recall, you heard from Barbara Marley
20 and Terry Brewer, that eventually that practice of advancing
21 on a matured facility ended, but it wasn't until almost a
22 year later. Mr. North was identifying this as a problem in
23 November of 2008.

24 The next example, from June of 2008, which is a
25 few months earlier. Mr. North noting with respect to the

1 hundred plus or minus in matured interest current loans that
2 need to be addressed. And he writes on the latter, if we've
3 completed our approval process on these. But the
4 documentation has not gotten processed. I'm okay with
5 waiving. All other "I'm working on it" situations are not
6 ones that we should be waiving.

7 And he also ties his knowledge of the impact of
8 the waiver practice in the next paragraph.

9 Mr. North writes that getting this done is,
10 "extremely important as we report out our second quarter
11 numbers." So when you are asked to consider the defendants'
12 knowledge that conduct was wrongful and unlawful, well,
13 here, there's a recognition from Mr. North where the
14 numbers are going. They are going to be reported out
15 publicly, and he is aware of the impact of not reporting
16 the waived loans.

17 What was the standard in 2009? Defendant
18 North's standard, and this came from the testimony of
19 Mr. Cummings in an e-mail that we'll see in a moment, was
20 only to waive bank errors or loans that were extended, but
21 not processed on the Shaw system in time. Defendant North
22 disregarded his own standard, as the evidence has shown.

23 This is the initial e-mail, Government's
24 Exhibit 445, that Steve Cummings sent to Bill North in
25 January of 2009, that starts, Bill, for you to edit or

1 forward. And the highlighted portion is what Mr. North
2 included in the e-mail. And Mr. North notes in his edits
3 that, I had thought that for the last few quarters, that we
4 were trying to only waive bank errors or loans that made it
5 through the approval process.

6 He also notes at the very end, and this is the
7 section added by Mr. North, that in reference to a true past
8 due number, "Without a lot of adjustments, that could raise
9 issues for us at some point in the future."

10 And so again, as you're asked to determine
11 defendant North's knowledge, his mental state, his
12 willfulness in committing the conduct, there's an awareness
13 here of, the goal is to report a true past due number. That
14 is, not to report or not to waive matured loans.

15 And ultimately, this is the e-mail that goes out
16 to members of the lending staff, the relationship managers,
17 who are -- who have responsibilities over the portfolio.

18 The evidence has shown that there's a reason why
19 this didn't happen, because in a bad economy, when no
20 developments are being built, it is really hard to extend a
21 commercial real estate loan. That is because, as you heard
22 at trial, extending a matured loans requires the same level
23 of underwriting, if not more, than making the loan in the
24 first place, because something has happened along the way.
25 The expectation is the project will be complete in three

1 years. That's the testimony that you heard. But something
2 has happened along the way that that did not occur.

3 And so Marty Infanti testified that loan
4 underwriting should be more robust when extending loans in a
5 bad economy.

6 Rich Conway testified that the bank applied the
7 same considerations at the time of extension that they did
8 at loan origination.

9 Terry Brewer explained that the maturity date is
10 the bank's chance to re-evaluate a matured loan and to
11 re-underwrite it, and that you want to understand why that
12 particular loan has not performed as contemplated at the
13 time of the original underwriting.

14 And Mr. Fomunyan explained to you why it's so
15 important to underwrite matured loans in a bad economy, and
16 he noted that in the 2010 examination, he specifically
17 brought up the fact that he was seeing a lot of short-term
18 extensions as a problem, because it has the ability to
19 otherwise mask delinquent loans within the portfolio.

20 So where are we by the summer of 2009? Waived
21 loans are becoming overwhelming. There's an e-mail from
22 Rich Conway to defendant North in June of 2009 where he
23 attaches a list that shows that there are 507 loans totaling
24 \$708 million that have either matured or are going to mature
25 by quarter end. And he notes that the reality today is the

1 number is overwhelming, and that's reflected in the next
2 chart.

3 If you recall, Mr. Hart testified about his
4 analysis of the waived loans going through the Shaw system
5 and the delinquency report, and the relevant waived loan
6 categories are reflected in yellow on the chart. And look
7 at the steady growth of matured loans from, that were waived
8 from the first quarter of 2009 to the second quarter of 2009
9 and to the apex of the waiver practice, which is where the
10 charged conduct begins, in the third and fourth quarters of
11 2009. And what the chart shows is that by 2009, loans that
12 were made during the boom time, they had now become past
13 due. They weren't being extended. They were just being
14 waived. And so the little white lie that's referenced back
15 in September of 2009, now ten years later, that right there
16 is a matured loans beast.

17 And at the time of the charges, when the charged
18 conduct begins, we're not talking about \$1.1 million in
19 waived loans. We're not talking about \$2.7 million in
20 waived loans. We're not even talking about \$41 million in
21 waived loans. At the time that the charged conduct begins,
22 the number is almost \$300 million. It's a massive, massive
23 increase in matured loans that otherwise could not be
24 properly extended.

25 What else did we find out about the waiver

12:27:04 1 practice over the course of the trial? The waiver practice
12:27:06 2 applied to commercial borrowers, the riskiest type of
12:27:10 3 borrowers within the portfolio. Only commercial borrowers
12:27:14 4 were eligible for waived loans with commercial real estate
12:27:21 5 lending being the riskiest type of lending.

12:27:25 6 The defendants and the bank did not waive or
12:27:27 7 fail to report past due retail loans. If you recall from
12:27:33 8 Dr. Simmons' testimony last week, that comprised about
12:27:35 9 \$2.2 billion in loans within the portfolio, and Dr. Simmons
12:27:40 10 testified that with respect to delinquency report, there was
12:27:45 11 no evidence that home mortgages were being waived. There
12:27:47 12 was no evidence that credit card, credit card payments were
12:27:50 13 being waived. There was no evidence that auto loans were
12:27:53 14 being waived. The waiver practice applied to commercial
12:27:56 15 real estate loans and other types of commercial loans that
12:27:59 16 were among the riskiest types of loans within the bank's
12:28:04 17 portfolio.

12:28:04 18 We also saw evidence that the bank knew how to
12:28:09 19 follow the standard in terms of extending loans the right
12:28:13 20 way. And if you remember, the demonstrative that's being
12:28:21 21 shown on the screen right now came in through Larry Hart's
12:28:27 22 testimony.

12:28:28 23 And what Mr. Hart testified was based on an
12:28:30 24 analysis of the delinquency reports, the past due reports
12:28:32 25 and the Shaw system, in 2008, almost nine out of every ten

1 times the bank was able to extend loans before they ever
2 became past due. So nine out of ten times before a loan
3 ever hits its maturity date, the loan was extended.

4 Even as we get into 2009, a little bit more than
5 eight out of ten times, the bank was extending loans before
6 they reach their maturity date.

7 And what that shows is that the bank and its
8 employees knew how to extend loans the right way, but that
9 with respect to the loans that weren't extended, they either
10 could not or they chose not to do so. Those were the loans
11 that weren't extended. And they feed right into the chart
12 that you saw in terms of the massive growth of matured loans
13 that were waived. Now, what was the justification that you
14 heard for the waiver practice? It's that loans were current
15 for interest and "in the process of extension."

16 Let's talk about current for interest first.
17 You saw the Federal Reserve findings relating to working
18 capital lines of credit and the fact that those types of
19 lending practices could mask problem loans and delinquency
20 levels.

21 You saw the findings that the ten percent rule
22 could create undue repayment risk for the bank.

23 You saw that KPMG, the e-mail relating to KPMG,
24 the red flag and the subsequent e-mail about the Grand
25 Inquisitors.

1 You also heard evidence throughout the course of
2 the trial of supplemental financing that was keeping loans
3 current for interest.

4 And if you recall, this is Government's
5 Exhibit 1031-C, and it's a chart that came into evidence
6 that Mr. Hart prepared that just related to the third and
7 fourth quarters of 2009, situations where the bank
8 internally was making self-pays or cross-pays across
9 particular loans.

10 And what did Mr. Hart find? That there were 51
11 total loans totaling 1.3 -- \$103.5 million just during that
12 two-month time period. Now, as Mr. Hart testified, that's
13 only based on his review of payment histories and batch
14 sheets and certain loan documents. What doesn't it include?

15 It doesn't include other situations, anecdotal
16 situations like Mr. Fomunyan testified about, situations
17 where a working capital line of credit might have been made
18 to a real estate home builder and then that home builder was
19 sending in a check to make the payment. But just this alone
20 in the last two quarters of 2009, 51 loans totaling \$103.5
21 million.

22 The defendants put on their own summary witness,
23 Mr. Pelillo, who told you he only looked at one month of
24 batch sheets during the relevant time period, September of
25 2009, and that he was not told to look at payment histories

1 at all. But even with Mr. Pelillo's analysis, he identified
2 approximately \$55 million in loans that were supported by
3 supplemental financing.

4 In terms of process of extension, the evidence
5 has shown that there is zero due diligence in terms of
6 finding out whether or not loans were actually in the
7 process of extension.

8 Mr. Cummings testified that waivers were
9 automatic as long as loans were current for interest.

10 Mr. Conway testified about the walk-around, that
11 you heard a lot about the walk-around during the opening
12 statements of defense lawyers. Your recollection controls,
13 but Mr. Conway testified that the walk-around only related
14 to payments and billing errors, and he also told you that
15 it only takes one month to six weeks to actually extend a
16 loan.

17 You also heard, I think if you recall back to
18 opening statements, a lot of promises about how long it took
19 to get an appraisal at Wilmington Trust. Well, during
20 trial, Margery Stuart, who was in charge of the appraisal
21 group, testified it only took three to eight weeks even
22 during the bad point in the economy with the mean period of
23 about four to five weeks, not six months, not eight months,
24 not a year.

25 And, more importantly, the lack of due diligence

1 is apparent when you review the delinquency reports. And if
2 you recall, when Tosha Towe or Tosha Styles now testified
3 and there was all the sorting and the filtering and the use
4 of the spreadsheets, one of the things that happened during
5 her testimony was to show you how many days past due certain
6 loans were, where she went to the one column and clicked on
7 it, it went from Z to A, so it showed loans with the most
8 past due to the least.

9 And so it's a little difficult to see on the
10 screen, but this very first loan, 791 past due in the third
11 quarter of 2009. The second one, 655. The fourth one,
12 456 days past due. Every loan on the screen is more than
13 nine months past due, and it gets even worse in the fourth
14 quarter of 2009, where we have 67 loans that were waived
15 were more than nine months past due, 270 days or more past
16 due.

17 You heard from several bank employees who raised
18 concerns about the bank's use of waived loans to some of the
19 defendants. Marty Infanti testified that he told Bill North
20 that the waiver practice was not an appropriate way to
21 handle past due loans, and that it could have the impact of
22 the bank overstating earnings. Again, a recognition of
23 where the numbers are going to be reported and how they
24 would be relied upon.

25 Mr. Brewer testified that there were a number of

1 issues relating to matured loans in terms of making
2 advancements on matured loans and seeing other issues
3 relating to the practice that we'll talk about in a few
4 minutes.

5 Tosha Styles raised issues with respect to
6 matured loans with Mr. Gibson and Mr. North, and you'll see
7 an e-mail in a moment of what her reaction was when the
8 waiver practice finally ended.

9 And Karen Thuresson, Marty Infante's boss, she's
10 sent an e-mail in September of 2009. One of the recipients
11 is defendant North, and she notes, the level of loans which
12 have been matured 90 plus days needs to be better managed.
13 A maturity billing is a principal billing, and to the extent
14 the maturity is not addressed, principal is delinquent.
15 That delinquency grows until the loan is repaid or otherwise
16 extended. And she notes, we really need to get ahead of the
17 maturity on these loans.

18 So if there's an argument that defendant North
19 didn't know what the standard was in terms of matured loans
20 equaling a past due loan, he receives an e-mail from Ms.
21 Thuresson right there in September of 2009, and that has a
22 bearing on his knowledge, his intent, and his willfulness to
23 commit the charged offenses.

24 I mentioned the e-mail from Tosha Styles that
25 came into evidence, where she learns in July of 2010 that

1 the waiver practice is no more. The reaction is, I did it.
2 I did it. I only took ten years, but I did it, yay, with a
3 bunch of exclamations. And remember she raised concerns
4 about the waiver practice directly with Mr. North and
5 Mr. Gibson, relating to the fact that loan maturities were
6 staying on the list for such a long time period and that she
7 told him she thought that there should have been a renewal
8 period in a much more shorter time period.

9 But what happened? Well, the waived loans are
10 approved anyway. Steve Cummings testify that Bill North
11 would also approve the waiver of the loans either orally or
12 via e-mail, and here is an example of one of the e-mails
13 that came into evidence from March of 2010.

14 One of the issues that you are asked to decide
15 is whether the public reports excluding waived loans were
16 false, and the jury instructions note that an entry is false
17 if untrue when made. An entry may be false if it records a
18 transaction which did not occur or fails to record a
19 transaction which did occur and should have been accurately
20 reported or inaccurately reports a record or records a
21 transaction.

22 The evidence has shown that waived loans, the
23 waived matured loans equals false reporting. Several points
24 here. The first is the Court's instructions regarding the
25 reporting standards, they control.

1 Second, matured equals late for principal equals
2 past due, and we'll talk about loan contracts, the bank's
3 accounting system, the bank's policies, and the course of
4 conduct of the defendants and other bank employees in
5 recognizing that a matured loan was a past due loan.

6 And, third, common sense.

7 Let's start with the instructions. His Honor
8 referenced the past due status of matured loans under the
9 call report instructions for schedule RC-N. This is
10 Government's Exhibit 86-A, which was introduced into
11 evidence.

12 And the circumstance four of the call report
13 instruction states, the past due status of a loan or other
14 asset should be determined in accordance with its
15 contractual repayment terms. For purposes of the schedule,
16 grace periods allowed by the bank after a loan or other
17 asset technically has become past due but before the
18 imposition of late charges are not to be taken into account
19 in determining past due status. Remember we just saw a
20 slide that showed 67 loans that were more than 270 days past
21 due. That's a pretty long grace period.

22 Third, furthermore, loans, leases, debt
23 securities and other assets are to be reported as past due
24 when either interest or principal is unpaid in the following
25 circumstances. And, ladies and gentlemen, you should look

1 at the actual instructions and see that the word "or" is
2 underlined in the instruction. It's underlined there and
3 it's underlined in the next definition, and so compare that
4 underlined language and see if anything else is underlined
5 or emphasized in the rest of the instruction. It's showing
6 the emphasis that's being placed on the reporting.

7 Now, circumstance four states, single payment
8 notes, debt securities, and other assets providing for the
9 payment of interest at maturity are to be reported as past
10 due after maturity if interest or principal remains unpaid
11 for 30 days or more. And, once again, the word "or" is
12 underlined in the instruction.

13 Now, you'll have a chance to review Judge
14 Andrews' instructions relating to past due on the call
15 report. Those instructions control your deliberations,
16 but I've placed them on the screen, and they are on page
17 32.

18 And in the instruction it notes, the fourth
19 circumstance outlined under the definition covers the past
20 due status of loans that are past due because they have
21 matured. That is the loans are overdue for principal
22 repayment under the terms of a contractual loan agreement.

23 There is also a standard in the Court's
24 instruction that relates to past due for securities filings.
25 And way back when Donald Walker testified on, like, the

1 second or third day of trial, this exhibit was introduced,
2 which is Government's Exhibit 12, SEC Industry Guide 3. And
3 the industry guide notes, as of the end of each reported
4 period states separately, the aggregate of loans in each of
5 the following categories. And with respect to B, it says to
6 state specifically "accruing loans which are contract
7 contractually past due 90 days or more as to principal or
8 interest payments."

9 That definition is tracked in the instructions
10 that His Honor read you before closing arguments, and it
11 states, the past due section states that bank holding
12 companies must, as of the end of each reported period, state
13 separately the aggregate of accruing loans which are
14 contractually past due 90 days or more as to principal or
15 interest payments. It's virtually an identical standard to
16 what you saw in the call report.

17 And the last standard that applies that His
18 Honor instructed you on is the standard that applies to
19 financial statements within SEC filings, which boils down to
20 this. Tell the public your past due policy.

21 Another exhibit that came in through Mr. Walker
22 was the GAAP or the generally accepted accounting principle
23 relating to past due loans. And that evidence explained
24 that the summary under GAAP, the summary of significance
25 accounting policies shall include the following: "The

1 policy for determining past due or delinquency status (that
2 is, whether past due status is based on how recently
3 payments have been received or contractual terms)."

4 And then 50-7, once you state your policy, it
5 indicates that there's a disclosure that must be given, it's
6 required, the reported investment in loans past due 90 days
7 or more and still accruing.

8 And so Judge Andrews instructed you in
9 accordance with that particular definition, and that is
10 that an entity's summary of significant accounting policies
11 shall include the policy for determining past due or
12 delinquent status (that is, whether past due status is
13 based on how recently payments have been received or
14 contractual terms).

15 The evidence has shown that Wilmington Trust's
16 call reports and SEC reports and the one monthly regulatory
17 report were false. And so on the chart that we looked at
18 earlier, the yellow is all the waived matured loans.
19 Matured loan means past due for principal repayment.
20 Therefore, the non-inclusion of matured loans equals false
21 past due reporting. It's that simple.

22 The standards as instructed by the Court are
23 tied to the contractual repayment terms of the loan
24 agreement.

25 Now, during opening statements, you heard from

1 one of the lawyers for the defendant, "The bank can do
2 whatever it wants," and you saw a promissory note. In a
3 provision of the promissory note, in the general provisions
4 section and the argument is, a bank can extend a loan for
5 any reason it wants. The bank can essentially do whatever
6 it wants to do.

7 Well, that is not the whole story and it just
8 isn't true. That is only the promissory note. As you heard
9 testimony about, the promissory note was part of a larger
10 packet of documents, and they all fell under the terms of
11 the loan agreements. And every construction loan agreement,
12 commercial loan agreement at Wilmington Trust had a maturity
13 date, and it had a maturity date for a reason, because that
14 is the date when principal would be past due and owing.

15 And so on this example, which is a \$1 million
16 loan for the Bale Group, you see that the principal amount
17 was \$1 million, the loan date was April of 2006, and the
18 maturity date is April of 2009, which is consistent with the
19 testimony that you heard that most of the construction loans
20 were based on a three-year term.

21 Now, both parties would have to agree to the
22 essential terms of the construction loan agreement, and it's
23 not the easiest to see because of the small print within the
24 contract, but the loan agreement notes that it's made and
25 executed between the parties, the bank and the Bale Group,

1 and notes that it's made on certain terms and conditions.

2 It states that lender is willing to lend the loan amount to
3 borrower solely under the terms and conditions specified in
4 this agreement and the related documents. And we'll see
5 that term related documents defined in a moment.

6 It notes that the agreement is effective as of
7 April 13, 2006, and shall continue in full force and effect
8 until such time as all of the borrower's loans in favor of
9 lender have been paid in full.

10 So under the clear language of the contract,
11 this loan agreement is going to continue in force until the
12 bank is repaid.

13 There's a miscellaneous provision that relates
14 to how this contract can be changed, and it's really
15 important. And so in the amendment section it states, this
16 agreement with any related documents -- and, again, related
17 document is the note -- constitutes the entire understanding
18 and agreement of the parties as to the matters set forth in
19 this agreement. No alteration or amendment to this
20 agreement shall be effective unless given in writing and
21 signed by the party or parties sought to be charged or
22 bound.

23 Let me read that again. It states, no
24 alteration or amendment to this agreement shall be effective
25 unless given in writing and signed by the party or parties

12:48:22 1 sought to be charged or bound.

12:48:24 2 There is a note paragraph which states
12:48:30 3 specifically the word "note" means the promissory note, and
12:48:33 4 it references the \$1 million original principal amount from
12:48:38 5 the borrower, which was the Bale Group, to the lender
12:48:43 6 "together with all renewals of, extensions of, modifications
12:48:47 7 of, refinancings of, considerations of, and substitutions
12:48:51 8 for the promissory note or the agreement, explaining that
12:48:57 9 the commercial loan agreement is going to continue to run
12:49:02 10 enforced with respect to any extensions or later
12:49:09 11 modifications."

12:49:09 12 In the next paragraph it states, the words
12:49:11 13 "related documents" means all promissory notes.

12:49:15 14 This is a legal binding document. As you can
12:49:20 15 see, the commercial loan agreement is signed by both the
12:49:26 16 bank and the borrower. That's different from the promissory
12:49:28 17 note, which we will see in a moment.

12:49:31 18 Government's Exhibit 1603-A was the promissory
12:49:36 19 note for the Bale Group loan, and you'll see the principal
12:49:40 20 amount of \$1 million. The loan date the same, April 13th of
12:49:47 21 2006. The same maturity date as the commercial loan
12:49:50 22 agreement. And contained therein is a promise to pay, and
12:49:53 23 the promise is that the Bale Group "promises to pay to
12:49:56 24 Wilmington Trust Company the principal amount of \$1 million
12:50:00 25 or so much as may be outstanding together with interest on

1 the unpaid outstanding principal balance of each advance."

2 And in the next section in terms of payment,
3 borrower will pay this loan in one payment of all
4 outstanding principal plus all accrued unpaid interest on a
5 certain date.

6 Now, the promissory note indicates that the
7 borrower is still going to have to make interest payments
8 even after the maturity date. I mean, that's because the
9 bank is now out a million dollars to the Bale Group, and so
10 unless that loan goes on nonaccrual status or is charged
11 off, the bank is still going to charge interest. And so the
12 provision in the promissory note states, "Upon default,
13 including failure to pay upon final maturity." It's listed
14 as default under the terms of the promissory note. And,
15 moreover, a default is defined as borrower fails to make any
16 payment when due under this note.

17 As I mentioned, in connection with the loan
18 agreement, only the borrower signs the promissory note,
19 which is a related document to the loan agreement.
20 Ultimately, the commercial loan agreement controls
21 everything -- the loans, extensions or modifications to
22 that loan and all the terms or conditions of the promissory
23 note.

24 Those are the plain terms, the plain meaning of
25 the contracts that govern all of the loans that are at issue

1 in this case.

2 The bank's course of conduct, how they
3 considered those loan contracts, it's equally important for
4 you in determining whether the loans were contractually past
5 due.

6 So we heard testimony that matured loans equal
7 past due under the Shaw system, which nearly every witness
8 testified was the bank's commercial loan accounting system.

9 And so here is a snapshot from Shaw. It's
10 Exhibit 33. It's a little bit difficult to see. But the
11 next slide is an enlargement of a certain section of Shaw.
12 And you will see the very first loan that's on the
13 spreadsheet is the Bale Group. It's the loan that we just
14 looked at. It's a little bit more than a million dollars
15 past due for principal.

16 So under Shaw, every single one of the loans
17 that is listed in the enlarged section, they are all past
18 due. They're listed as past due in the Shaw system because
19 they have matured.

20 If you look at the past due interest column, all
21 of these loans are current for interest. And as I
22 mentioned, the very first loan is 5001, the Bale Group loan
23 that was originated April 13th of 2006 with a little bit
24 more than \$1 million due and owing.

25 That is the same that we just saw, the same

1 commercial loan agreement, Government's Exhibits 1603 and
2 1603-A. That loan was considered to be contractually past
3 due on the bank's internal loan accounting system.

4 Now, the very first witness that the Government
5 called in the case was Hickman Beckner. He is the guy that
6 worked for the Shaw system. And if you recall, Mr. Beckner
7 testified that the Shaw system could be customized. The
8 bank was sold the system in a certain way back in the
9 eighties or nineties, or whenever it was. It was well in
10 advance of this particular period.

11 And he testified the bank had the system for
12 years. And no one called up Hickman Beckner or any of his
13 colleagues at the Shaw system and said, hey, Hickman, can we
14 modify the Shaw system because these loans aren't actually
15 past due, because you see, we have a general provision in
16 the promissory note and we don't think the notes are past
17 due, so can we change the Shaw system? No. No one ever did
18 that.

19 And so on the bank's commercial loan accounting
20 system, the subledger, the Shaw system, every single one of
21 these loans that have matured and are current for interest
22 are considered to be past due.

23 Special Agent LoPiccolo did the summary chart of
24 all the various loan agreements that came in on one of the
25 last days of trial. It's Government's Exhibit 1038. And

1 you can take a look at that exhibit and see that the terms
2 of the commercial loan agreements and the promissory notes
3 remain consistent across all of the loans that are at issue
4 in this case.

5 Another reason why the bank's course of conduct
6 demonstrates that they thought that loans were contractually
7 past due comes from the bank's own policies. And so when
8 Marty Infanti testified, we introduced an exhibit that
9 related to the credit risk management policy at the bank,
10 and that required that there be signed documentation in
11 order to adjust loan information on the Shaw system.

12 And so it states, it references specifically
13 modifications to existing loans, and states, all required --
14 through this process, we confirm that proper approval was
15 obtained, conditions of the approval are met in the final
16 loan documents, all required documentation pertaining to the
17 transaction is received, documents are executed by the
18 appropriate parties, documents are properly dated, et
19 cetera.

20 Why even have a document review staff if you
21 don't have to review the signed documents? If the documents
22 don't matter, signed documents don't matter, if you can just
23 do oral extensions, why is this even relevant? Why do you
24 have to hire people to review documents to see if they've
25 actually been signed by the parties? And that's why if you

1 hear arguments later during the closing arguments of defense
2 counsel that you can do oral extensions of loan agreements,
3 or it was consistent with the defendants' understanding of
4 contractually past due loans at the time, the evidence
5 doesn't show that.

6 Under the delinquency report, and you've seen a
7 bunch of delinquency reports, the waived loans were listed
8 as matured. Specifically, they stated, matured in process
9 of renewal or for billing or collection errors. They aren't
10 listed in the column as oral extension with borrower. It
11 doesn't state in that last column, not past due per general
12 provision in the promissory note.

13 The loans were past due. They were matured.
14 The bill was due and owing. And there's an example of what
15 the comments were with respect to matured loans.

16 In addition, a waiver did not equal
17 "administrative issue under bank policy," and this is
18 another bank policy that came in through the testimony of
19 Martin Infanti, which notes that there were certain types of
20 past due loans that were excluded due to "administrative
21 issues."

22 And the only administrative issue that's listed
23 in the policy is internal misapplication of payments
24 received. There's no mention in the policy about waived
25 loans, and there's also no mention in the policy which

1 relates to the monitoring of past due loans that certain
2 loans weren't past due because of the general provision of
3 the promissory note. It's just not there.

4 You also saw evidence that the bank actually had
5 a temporary extension policy, and let's see what that said
6 in terms of signed documents.

7 The temporary extension policy can only be used
8 once, up to a total of 90 days from the maturity date, which
9 meant all of those 90-day past due loans, because they had
10 reached 90 days, none of them were eligible for the
11 temporary extension policy.

12 But importantly in terms of this concept of
13 whether documents have to be signed in order to extend a
14 matured loan, it notes that any extension to a matured loan
15 must be documented with a change in terms agreement signed
16 by the borrower. Again, nothing in the temporary extension
17 policy about oral extensions of loan agreements at
18 Wilmington Trust. And that's consistent with the testimony
19 of every single witness who was asked about it over the
20 course of trial.

21 In addition, when the bank reported past due
22 loans to the Federal Reserve, they actually included matured
23 loans. You heard Mr. Fomunyam testify that in advance of
24 the 2009 full scope examination, that the Federal Reserve
25 specifically requested that the bank provide a list of loans

1 that were 90 days or more past due and accruing. And what
2 did the bank provide? A list of loans where one, two,
3 three, four, five, six of them out of 17 on the list were
4 listed as past due by the bank because they had matured, and
5 some of them specifically referenced extension in process.
6 And that's why Mr. Fomunyan testified that he thought that
7 Wilmington Trust was reporting past due loans, because that
8 is the document that had been provided to the Federal
9 Reserve. All of this is consistent with the defendants' own
10 understanding of what was required to extend the loan.

11 What's on the screen right now is Government's
12 Exhibit 476-A, and it's a memorandum written by defendant
13 North in March of 2010, and you'll see this document quite a
14 bit today as well.

15 But importantly, for purposes now, where Mr.
16 North is talking about the bank having to go through another
17 round of short-term loan extensions, he writes, what will
18 also be imperative is that these extensions be followed up
19 by the full execution of any required documentation in order
20 to get these loans updated on Shaw.

21 And the followup e-mail between Mr. Harra and
22 Mr. North, where Mr. North describes, what we're talking
23 about, a change in terms for LaserPro deals were some sort
24 of modification. So even the defendants' own course of
25 conduct or own understanding is that you have to get signed

1 documents in order to extend the loan.

2 And it's a common sense proposition. Wilmington
3 Trust was an \$11 billion bank. It's not a lemonade stand.
4 It was a sophisticated entity where signed documents were
5 required.

6 And you also heard about uniformity across the
7 banking system why that was so important. Mr. Fomunyan
8 talked about in advance of examinations pooling peer group
9 averages, to see how Wilmington Trust was performing against
10 other banks.

11 Mac Hodgson testified the information in the
12 call report was so important because everyone reported it
13 out the same way. There wasn't any variation. And that's
14 consistent with the call report instructions, which note
15 that banks are required to prepare and file the call reports
16 in accordance with the instructions. And then if anyone has
17 any questions, just pick up the phone and call the Federal
18 Reserve and ask the question.

19 And, finally, before we take our lunch break,
20 one last slide. Think about it, ladies and gentlemen. No
21 written extensions would lead to chaos, because you would
22 have to have court proceedings with every single borrower to
23 determine, what is the maturity status?

24 And when Mr. Fomunyan and his fellow examiners
25 are in looking at a bank, remember, they're only in there

1 between a four to eight-week period. Every time that
2 Mr. Fomunyan and the asset quality examiners are looking at
3 a loan relationship, they would have to bring in the
4 borrower and the relationship manager, sit them both down in
5 a room and say, hey, borrower for Acme Corporation, what's
6 the maturity date? Hey, Mr. Terranova, what do you think
7 the maturity date is?

8 It just doesn't make any sense. It would be
9 chaos. Once again, it was an \$11 billion bank, and the
10 course of conduct at the bank was to require written
11 documentation to extend the loan agreement, and that's
12 because all of these loans were past due once they hit
13 maturity.

14 THE COURT: All right. Thank you, Mr. Kravetz.

15 So we'll take our lunch break until
16 2:00 o'clock.

17 And if we can take the jury out, please.

18 (The jury was excused for a luncheon recess.)

19 THE COURT: All right. So the plan will be when
20 we come back that Mr. Kravetz will go for however long he
21 goes until he finishes. That's when we take our afternoon
22 break.

23 Mr. Kelly, do I understand that you are first
24 after that?

25 MR. KELLY: Yes, Your Honor. I'm on deck.

1 THE COURT: And do you have a -- what's your
2 estimate right now of how long you'll be?

3 MR. KELLY: Under 90 minutes.

4 THE COURT: Okay. The reason I ask is because
5 I'm trying to figure out a what will happen if Mr. Kravetz
6 goes on longer so that all things considered, not to have
7 your argument be broken up, part today, part tomorrow.

8 MR. KELLY: Well, I don't know how much longer
9 Mr. Kravetz has, Your Honor.

10 MR. KRAVETZ: I think I will be past 3:30.

11 THE COURT: All right. Well, thank you.

12 MR. KELLY: A short break, that might do it.

13 THE COURT: Well, I guess what I'm wondering is,
14 I would think I could ask the jury are they willing to stay
15 a little bit later, because I would like, if you are
16 starting at quarter of 4:00 or something, you think you're
17 going to be 90 minutes, my preference overall would be to go
18 to 5:15 and be done with you.

19 MR. KELLY: I think I can do that, Your Honor.

20 THE COURT: Okay. All right. All right.
21 Anything else?

22 MR. KRAVETZ: No, Your Honor.

23 MR. BREEN: No, Your Honor.

24 THE COURT: Thank you. We'll be in recess.

25 (Luncheon recess taken.)

- - -

Afternoon Session, 2:00 p.m.

THE COURT: All right. Everyone be seated.

Are you ready?

MR. KRAVETZ: Yes, Your Honor. If I'm watching the clock, what is the afternoon timing for the break?

THE COURT: Well, I was going to really just try and do it whenever you reached an end.

MR. KRAVETZ: Okay.

THE COURT: But if it gets to be 3:30 and you've got an hour in you --

MR. KRAVETZ: Okay.

THE COURT: -- just declare your own break.

MR. KRAVETZ: Okay. Thank you.

THE COURT: I will remember that.

MR. KRAVETZ: Thank you, Your Honor.

THE COURT: Mr. Kravetz, do you expect to go much beyond 3:30?

MR. KRAVETZ: A little bit.

THE COURT: If we're talking like quarter of 4:00, just go to quarter of 4.

MR. KRAVETZ: If I know where I am, I will take the break.

THE COURT: All right. Use your best judgment.

MR. KRAVETZ: Thank you.

1 (The jury entered the courtroom.)

2 THE COURT: All right. Members of the jury,
3 welcome back. Everyone, you may be seated.

4 Mr. Kravetz, you may continue.

5 MR. KRAVETZ: Thank you, Your Honor. Good
6 afternoon.

7 We left off talking about the falsity standard
8 under which you'll evaluate whether past due loan reporting
9 was false under the call reports and the SEC reports, and
10 you may hear argument from the defense attorneys about a
11 document that was introduced on the last day of trial. It
12 was a Q&A web page that came from the Office of Thrift
13 Supervision, an agency that doesn't exist anymore, that's
14 now part of a different federal agency.

15 Ladies and gentlemen, there is no evidence that
16 the defendants relied on or even knew about the OTS web
17 page, none. Let's go over what we know about it.

18 The OTS web page that came into evidence, it's
19 Defense Exhibit 5541-A. The date at the bottom right-hand
20 corner is February 13th, 2012. It's at least a
21 year-and-a-half, almost two years after all of the conduct
22 at issue in this case.

23 You heard that this is not a document that came
24 from any of the defendant's desk files, like we saw with
25 some of the exhibits from Ms. Rakowski and Mr. Gibson.

14:06:07 1 Moreover, it wasn't a document that was produced by the bank
14:06:10 2 or Federal Reserve or KPMG because there's no Bates number
14:06:13 3 on the bottom right-hand corner. We all know about Bates
14:06:18 4 numbers. There aren't any markings on this particular
14:06:21 5 document.

14:06:21 6 How did this document become introduced into
14:06:24 7 evidence? It was introduced by a lawyer who works with
14:06:27 8 Mr. Gibson's lawyers and testified that she received it from
14:06:30 9 those lawyers and then read that as well as the other
14:06:33 10 documents into the record.

14:06:35 11 There is no evidence that this document came
14:06:38 12 from any of the four defendants, that they knew about it, or
14:06:44 13 they relied on it.

14:06:45 14 Let's also look at the substance. What does the
14:06:48 15 Q&A say? Two really important points talking about
14:06:53 16 construction loans at maturity. And in reference to
14:06:57 17 informal extensions, it talks about the extension should be
14:07:00 18 for a limited and reasonable length of time, and that the
14:07:04 19 bank should get the extension in writing.

14:07:08 20 Where have we seen that before? The bank's own
14:07:11 21 temporary extension policy, which talked about only having a
14:07:14 22 temporary extension up to 90 days and the requirement that
14:07:18 23 any extension be documented with a change in terms agreement
14:07:22 24 signed by the borrower.

14:07:23 25 In addition, the date of the Q&A, not just the

1 2012 date as being relevant, the 2002 date is relevant
2 because you might hear, well, there's language in the Q&A
3 that looks pretty similar to language used in the waiver
4 practice.

5 Remember that defendants introduced a document
6 from 1999 that we saw earlier that had the waiver language
7 back then. So unless someone traveled to the future, got
8 the OTS language and then went back in the past, no one
9 relied on this language for the waiver practice let alone
10 the defendants. There is no evidence at all that any of the
11 defendants ever saw the Q&A let alone relied on it.

12 So we end the section on falsity and past due
13 loans with a few points to consider. If the loans weren't
14 past due, why waive them? There's no reason to waive a loan
15 if it's not past due. If the loans weren't past due, why
16 stop waiving them, because at some point, the waiver
17 practice ends, finally, the second quarter of 2010.

18 And if the loans weren't past due, why
19 mass-extend them? Why would you ever have to extend a loan
20 that wasn't past due?

21 And that brings us to Wilmington Trust's past
22 due reporting during the relevant time period. As Ms. Wolf
23 indicated in her opening statement, Wilmington Trust
24 operated with two sets of books relating to past due loans,
25 and you saw evidence of that throughout the trial.

1 So the first enlargement on the screen is a
2 cutout of the bank's 2009 delinquency report. It is
3 Government Exhibit 53. And you will note in the top
4 portion, the waivers are blank, and as Ms. Towe testified,
5 this is one of the pivot tables that was created. What's
6 shown on the screen right now does not include the waived
7 loans, because there is no "Y" in the waiver column.

8 In the bottom right of the screen now is the
9 September 2009 past due and nonperforming loan report,
10 which was prepared by the controller's group led by Ms.
11 Rakowski.

12 As you'll see, the delinquency report with the
13 waived loans blank fed directly into the past due and
14 nonperforming loans report. And Mr. Hart testified how he
15 went through this process with respect to all of the
16 delinquency reports and the past due reports.

17 What is missing? The waived loans are missing.
18 And you see the difference when the pivot changes from blank
19 to Y, and now instead of 17 million plus in waivers, the
20 number jumps up significantly, well over \$300 million.

21 And then what happens? The waived loans are not
22 reported in the SEC reports. In the bottom right-hand
23 portion of your screen, you'll see management's discussion
24 and analysis. It's the period ended September 30, 2009, and
25 what's reported in the SEC reports is information not

1 including the waived loans.

2 Similar to the call report. You'll see on the
3 screen now the way that the information is filtered is,
4 waived blank in bank one, because bank one was the Delaware
5 bank, Wilmington Trust Company.

6 And so here, the blank with the bank one
7 compared to the internal call report reconciliation
8 document, they match. The same question: What is missing?
9 The waived loans. And look at the difference when that
10 pivot table is filtered to include the loans that had
11 matured but were waived. A significant amount, \$369 million
12 total in terms of the call reporting.

13 Now, Mr. Hart testified about the chart, and
14 this is now the second or third time that we have seen it,
15 but the chart is showing from left to right the impact of
16 the waiver practice on public reporting in 2009.

17 So the blue bar chart is what was reported in
18 the SEC filings for the first, second and third quarters
19 of 2009, and the bank's annual report at the end of the
20 year.

21 And the yellow represents the relevant waived
22 loans, so these were loans that were waived as current for
23 interest, in the process of extension, and not including any
24 loans in loan recovery.

25 Once again, it shows the waiver practice goes

14:12:03 1 from the little white lie to the matured loans beast. And
14:12:07 2 also importantly is, there's no evidence that there are any
14:12:09 3 steps to determine why these loans were current for
14:12:14 4 interest, or if some of the problems identified by the
14:12:16 5 Federal Reserve in the course of the 2009 examination have
14:12:21 6 been remedied or not.

14:12:22 7 Now, Mr. Hart also displayed another version of
14:12:25 8 the chart focusing just on the third and the fourth quarters
14:12:29 9 of 2009, and you can see from this particular chart that in
14:12:35 10 the third quarter of 2009, the bank reported \$17.4 million
14:12:40 11 in past due loans in its SEC report. A total of \$297
14:12:48 12 million of relevant loans were waived. Look at the numbers
14:12:51 13 though of loans that were six months or more past due,
14:12:55 14 \$139.3 million. \$83 million worth of loans were nine months
14:13:01 15 or more past due.

14:13:02 16 And then going across to the next bar chart, the
14:13:05 17 bank reports \$10.9 million in past due 90-day loans in its
14:13:11 18 10-K for 2009. \$303 million worth of relevant waived loans.
14:13:17 19 The number jumps now to \$160 million in loans that are now
14:13:22 20 more than six months due and still waived, and \$86 million
14:13:26 21 in loans that are nine months or more past due and waived.
14:13:31 22 And this is further evidence that there was no due diligence
14:13:35 23 with respect to whether these loans were actually in the
14:13:38 24 process of extension. The evidence has shown it doesn't
14:13:40 25 take six months to extend a loan let alone nine months let

14:13:47 1 alone a year. And you saw earlier, the call report
14:13:50 2 instructions, there is no grace period let alone six months
14:13:54 3 or six months.

14:13:55 4 The next chart shows the impact of the waiver
14:14:00 5 practice on the third and fourth quarter of 2009 call
14:14:04 6 reports, and for purposes of your determinations, the third
14:14:08 7 quarter 2009 call report, Counts 7 and 11 in the overall
14:14:14 8 conspiracy count, and the fourth quarter of '09, the counts
14:14:17 9 are Counts 8 and 12.

14:14:21 10 And look at the difference in terms of call
14:14:22 11 report reporting. The blue represents what was reported
14:14:24 12 in the relevant line items for purposes of the call report.
14:14:29 13 17.1 million versus \$296 million worth of relevant waivers.
14:14:36 14 And in the fourth quarter, a little bit over 8.5 million
14:14:40 15 versus 296 million of waived loans.

14:14:44 16 And then we look at the first quarter of 2010,
14:14:48 17 where in its Form 10-Q, the bank doesn't include
14:14:53 18 approximately \$32 million worth of waived loans, and \$31
14:14:57 19 million worth of waived loans in the call report.

14:15:00 20 Now, why is the number lower in the first
14:15:02 21 quarter of 2010? Well, remember, and we'll get to this in a
14:15:08 22 few minutes, that's when you have a lot of short-term
14:15:10 23 extensions at year 2009, and the bank was still and the
14:15:15 24 defendants were still waiving loans.

14:15:17 25 And finally, the waived loans continued through

1 2010. This is a defense exhibit showing that even at the
2 end of the second quarter of 2010, at a period in time when
3 the bank is going to be rated a five by the Federal Reserve
4 according to the chart that came in through the defense
5 witness, \$83 million worth of loans were still waived then,
6 six months after year-end 2010.

7 That brings us to the mass extension process, or
8 as what's termed on the slide, extend and pretend.

9 In 2009, the evidence has shown that the waived
10 loans became overwhelming. We saw the e-mail before from
11 Mr. Conway, reflecting that the reality today is the number
12 overwhelming given the time, resources and existing
13 processes for, the process for renewal.

14 Now, it's overwhelming as of June 11, 2009, but
15 we know from the record that the bank is required by the
16 Federal Reserve as of October 21st of 2009 to start
17 reporting past due loans on a monthly basis directly to the
18 Federal Reserve in the aftermath of a very critical
19 examination.

20 So what happens? A group of bank employees are
21 tasked with getting together to discuss "the process and
22 strategy to eliminate matured loans by 12/31," and as it's
23 written in the calendar invite for Mr. Conway and Mr. North
24 and Mr. Bailey and Mr. Terranova are attendees. It is
25 extremely important that we talk about matured loans and how

1 we can make them go away by 12/31. This cannot be a quick
2 fix for 90 or 120 days as the problem will just return.

3 Now, remember that last slide. It was
4 overwhelming in June with those numbers and back to the
5 chart as the number even grows higher in the third and
6 fourth quarters of 2009, but all of a sudden, the decision
7 point comes down that the loans have to be "eliminated" by
8 the end of the year. And that's reflected in e-mails. The
9 understanding was, try to extend all of the matured loans by
10 year-end 2009.

11 And so another e-mail that goes out relating to
12 the list of matured and maturing loans talks about, these
13 are the loans that have already matured and those maturing
14 by 12/31/09. As of 12/31/09, we can no longer do that, so
15 we must take care of all of these by 12/31.

16 So the initial understanding, this all has to be
17 taken care of by 12/31 of '09. On this list alone, 804
18 loans totaling \$1.3 billion are going to have to be
19 "eliminated" in about a two-month time period.

20 Another e-mail, Exhibit 626 and 626-A. This is
21 an e-mail that Mr. Terranova sends out to his lenders with
22 the same list that Mr. Conway sent, but it has been modified
23 to just include the Delaware CRE loans. And the
24 understanding is, senior management is requiring that all
25 matured loans be acted upon prior to 12/31/09. This will

1 include execution of CITAs, or change in terms agreements as
2 well.

3 And they note further, our goal should be to
4 extend most facilities for at least one year. Senior
5 management does not want to see a flood of 90-day extensions
6 in December, which just pushes back the process. Short-term
7 extensions should be the exception, not the norm.

8 That list contained 386 loans totaling
9 \$570 million. That's Delaware CRE loans, just Delaware CRE
10 alone, the riskiest types of loans within the portfolio and
11 the specific bank that has had the most criticism from the
12 Federal Reserve.

13 Now, the next e-mail is Defense Exhibit 3129,
14 and I would ask that you keep this e-mail in mind as
15 you consider the testimony of Terry Brewer and the
16 information that he provided to you over the course of
17 a day-and-a-half.

18 This is an e-mail from Mr. Brewer to Mr. North
19 in August of 2008. So we're talking almost a
20 year-and-a-half before the mass extensions at year-end 2009.

21 And Mr. Brewer writes specifically about renewal
22 extensions. "While I know Steve is working on changing the
23 form, I still can't understand how a renewal can occur or be
24 presented without a review of the current collateral and an
25 understanding of the borrower's/sponsor's cash flow.

14:20:26 1 Somehow this must start being included."

14:20:33 2 And keep this in mind, ladies and gentlemen, as
14:20:36 3 you see what actually happens at year-end 2009, because it
14:20:40 4 certainly isn't this.

14:20:42 5 Now, if Mr. Brewer couldn't understand how
14:20:44 6 that was the process that could occur in August of 2008,
14:20:48 7 fast-forward to November of 2009, where now there are a
14:20:53 8 number of matured loans that don't have updated appraisals.
14:20:58 9 And it's November 19th of 2009. And the bank has no idea
14:21:03 10 what is the collateral values of these loans, a number
14:21:07 11 of which had not been updated via appraisals in several
14:21:11 12 years.

14:21:11 13 And so Mr. Brewer writes now, November of 2009,
14:21:15 14 on expired yields where we are waiting appraisals to
14:21:18 15 complete our credit underwriting for renewal, meaning, we
14:21:22 16 don't have the information going back to the standard from
14:21:25 17 August of 2008. We will extend those loans until March 1st
14:21:28 18 of 2010.

14:21:31 19 So Mr. Brewer didn't understand how this is
14:21:37 20 something that was appropriate back in August of 2008,
14:21:42 21 but yet he gives in and decides to extend on a short-term
14:21:46 22 basis, on a mass basis, a number of loans any way at
14:21:49 23 year-end 2009.

14:21:51 24 And why is that? Well, the evidence shows
14:21:53 25 that he gives in and the bank does it anyway because the

14:21:58 1 problem is just too big. The task is impossible. There's
14:22:01 2 no way that you can extend 386 of the riskiest loans in the
14:22:07 3 bank's lending portfolio in less than two months. So we
14:22:12 4 moved from waivers into extend and pretend.

14:22:18 5 And Mr. Brewer testified about what went into
14:22:23 6 the mass temporary extensions at year-end 2009, and as a
14:22:30 7 juror, you can evaluate the demeanor and the way that a
14:22:35 8 witness presented himself or herself on the stand, and you
14:22:39 9 can consider Mr. Brewer's testimony and how he had to be
14:22:43 10 shown a document for every single answer by Ms. Wolf as
14:22:47 11 compared to how he was answering questions that were posed
14:22:49 12 to him by defense counsel. But even as uncomfortable as
14:22:54 13 Mr. Brewer was on the stand, he reluctantly acknowledged all
14:22:58 14 of the things on the slides. That the waiver practice made
14:23:02 15 him uncomfortable. That there was no robust underwriting
14:23:05 16 that went into underwriting decisions at year-end. He
14:23:09 17 referred to it twice as a superficial review process. He
14:23:13 18 called it a touch. There's an e-mail that describes that
14:23:17 19 loans were mass extended to "allow for the proper needed
14:23:22 20 level of underwriting."

14:23:24 21 And you can infer from the evidence that you
14:23:27 22 have received that there was no meaningful due diligence to
14:23:30 23 extend loans on a mass basis at year-end 2009. Loans were
14:23:34 24 missing documents and appraisals. Massive loan
14:23:37 25 relationships, like the Reybold relationship were extended

14:23:42 1 the same day or the next day. \$86 million. You know, a lot
14:23:46 2 of questions were asked to Mr. Terranova about the Reybold
14:23:50 3 relationship.

14:23:51 4 Remember what Mr. Brewer testified. He actually
14:23:53 5 went out and visited Meridian Crossing and some of the
14:23:56 6 Reybold projects. He testified that he understood the state
14:23:59 7 of those projects, and I know that there was an argument to
14:24:06 8 put everything on that relationship on Mr. Terranova. But
14:24:08 9 in one day, close to \$100 million worth of that relationship
14:24:12 10 was mass extended, and we'll see an e-mail in a few minutes
14:24:15 11 about what the true state of the Reybold relationship was as
14:24:19 12 of early 2010.

14:24:21 13 So mass extensions are basically just a new
14:24:26 14 version of the waiver practice, but the defendants still
14:24:30 15 waived \$303 million worth of matured loans at year-end
14:24:36 16 2009.

14:24:36 17 So mass extensions beg certain key questions.
14:24:42 18 First, if nothing was wrong with the waiver practice, why
14:24:46 19 change it?

14:24:48 20 Second, if you know how to properly extend
14:24:51 21 loans, why not do it the right way?

14:24:53 22 And, third, why not just tell the public that
14:24:58 23 these loans are past due? I mean, wasn't that the plan to
14:25:01 24 begin with, with some of the initial e-mails that come out
14:25:04 25 in late October, early November? We're going to do this by

12/31/09. We don't want to have short-term extensions at year-end. That's the original plan, but the problem became too big that the defendants did not follow it, and that's because it was impossible to meaningfully extend that many matured loans.

Mr. Brewer sends out an e-mail in which Mr. North is copied on January 6th of 2010. This is less than a week after the start of a new year 2010, and this is what Mr. Brewer talks about the loans that have been mass extended. We have a huge number of loans that have been temporarily extended until 4/1/10. The vast majority of these loans need to be actively touched (evaluate and negotiated for needed modifications), meaning they didn't do anything meaningfully. They just kicked the can down the road.

And he states further that the economy has adversely impacted the vast majority of our development project, and we need to address material weaknesses. In my mind, this yet is to be the biggest and most important task that we need to undertake in the Delaware real estate world.

And then he notes that we have "huge loan maturity issues," just less than a week after they mass extended hundreds of millions of dollars worth of loans.

And Government's Exhibit 418, and you'll see

1 this is an e-mail that all four of the defendants are on
2 this particular e-mail. And the bottom portion that is
3 called out is an e-mail, a portion of the e-mail written by
4 defendant North. And he's writing about the extensions, and
5 he talks about, we did a lot of extensions until April 1st,
6 2010 "so as to allow for the proper/needed level of
7 underwriting required on the CRE credits." They didn't do
8 what was required. They just pushed the loan dates out by
9 three months.

10 And then Mr. North writes further, The goal is
11 that by April 30th, we will have gotten through all of
12 these, with any needed structural changes, "supported by
13 authority low analysis/underwriting in order to avoid an
14 annual tidal wave of maturities in the future."

15 Clearly, the understanding of the defendants --
16 and, again, this is an e-mail in early January of 2010. All
17 of the defendants are on the e-mail, no idea that some day
18 this e-mail is going to be shown in the midst of a criminal
19 trial. And it notes that the bank and the defendants did
20 not do the type of thorough analysis and underwriting that
21 was required to extend loans.

22 These were bad loans. That's why. They just
23 couldn't meaningfully extend them and there were problems
24 within the loan portfolio.

25 And, once again, don't take my word for it.

1 Look at the evidence. An e-mail from Mr. North to
2 Mr. Harra, December 16, 2009, in which Mr. North refers to
3 loans that were extended as "credit turds." Many of these
4 credit turds will simply take some time to make or get
5 better.

6 An e-mail from Mr. Brewer talking about certain
7 loan relationships that were extended. Once again, this is
8 an e-mail from early January 2010, referring to the Reybold
9 relationship, which was signed one day after, received the
10 loan documents. It notes, it had a negative monthly cash
11 flow of something north of \$300,000. And he noted during
12 his testimony, that would be pretty much losing \$3.6 million
13 worth of cash throughout the calendar year.

14 P.J. Bale, that lending relationship we've heard
15 a lot about over the course of the trial. It's referred to
16 by Mr. Brewer as "speculative development."

17 What else do we know from the evidence that all
18 of the defendants know? And, again, all of the defendants
19 are copied on this e-mail. It's an e-mail dated
20 January 25th of 2010.

21 If you recall, Mr. Brewer testified about the
22 surge, the "troop surge" where they brought lenders down
23 from Pennsylvania and up to Maryland because the Delaware
24 lenders didn't have the time, the resources or the
25 capabilities to get their arms around the lending portfolio.

1 And one of the goals of the surge process was to take a look
2 at loans that had been extended on a short-term basis at
3 year-end.

4 So here we are now, January 25th of 2010,
5 and now bank employees are starting to look at these
6 loans and talking about the impact of the surge on risk
7 rating.

8 And just 25 days into the month in January of
9 2010, the recommendation is from the first wave of the surge
10 results, that there are going to be \$446 million worth of
11 loan downgrades just in the first 25 days of a month. This
12 is the information that all of the defendants have and it's
13 in late January of 2010.

14 Count 2 of the indictment charges the defendants
15 with securities fraud, and His Honor instructed you as to
16 what the standard is in terms of the scheme to defraud.
17 That it's any plan, device, or course of action to deprive
18 another of money or property by means of materially false or
19 fraudulent pretenses, representations or promises reasonably
20 calculated to deceive persons of average prudence.

21 And there's an additional instruction in terms
22 of what can include a false statement.

23 Now, under the scheme to defraud instructions,
24 the Government is not required to prove that a particular
25 defendant originated the fraud scheme. It's not necessary

1 that the Government prove that a defendant actually realized
2 any gain from the scheme, or that any intended victim
3 actually suffered any loss.

4 But you may consider whether the scheme
5 succeeded in determining whether it actually existed.

6 And what was the scheme? The scheme was to lie
7 about the bank's past due loans and related disclosures in
8 connection with the February of 2010 capital raise.

9 What was the purpose or benefit of the scheme?
10 Essentially, at that time it was to keep the bank, which was
11 in deep trouble, afloat. It was to provide a benefit to the
12 bank through the capital raise.

13 And you can infer from the evidence that as of
14 February 22nd of 2010, the bank was in trouble, and the
15 defendants -- the investors did not know the true condition,
16 the true financial condition of the bank, particularly,
17 focused particularly on its reporting of 90-day past due
18 loans. And the investors ultimately invest \$287 million in
19 a capital raise.

20 When is all of this happening? Just to follow
21 the timeline, we've just seen a number of e-mails from
22 October, November, December of 2009, January of 2010. Well,
23 remember the Fed came back for a target exam in January of
24 2010. It commenced on January 4th and concluded on
25 January 29th of 2010. And all of the information that we

1 have just discussed, all of the e-mail results, everything
2 relating to the surge process and mass extensions, that is
3 all information that the defendants knew at the time that
4 the Federal Reserve was onsite in January of 2010. And the
5 testimony from Mr. Corkery, Mr. Fomunyan, is that none of
6 the defendants said a word about it. In fact, the testimony
7 from Mr. Fomunyan is, he didn't realize that the bank had
8 engaged in a number of short-term extensions until he came
9 back in the summer of 2010 and noticed it in the course of
10 credit file reviews, and he told you how he raised it in a
11 meeting and said that it had the potential to mask the
12 reporting of past due loans.

13 Also focusing on the context, you'll see on the
14 screen Government's Exhibit 435. This is the, one of the
15 offering documents from JP Morgan. And you heard Michael
16 Schechter, who was the book runner from JP Morgan, who came
17 in and testified about the process of raising capital for
18 the bank, and that there was an organizational meeting on
19 February 1st of 2010, that Mr. Gibson and Ms. Rakowski
20 attended, and that there was a business due diligence
21 meeting on February 11th of 2010 that was attended by Mr.
22 North and Mr. Harra.

23 And this particular document listed all of the
24 due diligence questions that the underwriters asked in
25 connection with the process before the capital raise. And

14:34:33 1 some are really important.

14:34:34 2 So there's a question, please discuss credit
14:34:38 3 under writing guidelines, any recent or contemplated
14:34:43 4 changes. Please discuss loan modification programs. That
14:34:47 5 would have would have been a nice time to tell the
14:34:50 6 underwrite what had happened with the short-term extensions.
14:34:52 7 Any improvements in 30-day delinquency by portfolio and what
14:35:00 8 percentage of your construction loans have interest reserves
14:35:02 9 and are currently servicing interest payments?

14:35:04 10 And if you recall during the trial when that
14:35:07 11 document was up on the screen, one of the counsel for
14:35:09 12 defendant Harra asked Mr. Schechter, well, mass extensions,
14:35:15 13 all the banks were doing it at the time, weren't they? And
14:35:17 14 the answer was, never heard of that before.

14:35:19 15 And this is somebody who had been involved in
14:35:22 16 20-plus deals to raise money for banks all over the country
14:35:27 17 at the time.

14:35:30 18 We also saw through Mr. Schechter the documents
14:35:34 19 that were created to market the capital raise, and in
14:35:38 20 particular, on this slide, there's a discussion of the
14:35:42 21 bank's commercial loan portfolio or total loan portfolio was
14:35:49 22 of 12/31/2009. This was the document that was used to
14:35:52 23 market the capital raise to investors.

14:35:54 24 And what does it say in terms of underwriting?
14:35:57 25 It says, "Strong credit culture and stringent underwriting

standards." And ask yourselves as of that period in time at the end of January of 2010 whether that statement was correct.

Ultimately, the bank files its Form 10-K in February of 2010, February 22nd of 2010, and there are a number of statements within that document that are important to your consideration.

But first to show the relationship between the 10-K and the capital raise, the relationship between the 10-K and the capital raise, introduced into evidence was a document filed with the SEC called a prospective statement, where it lists, what is the offering price going to be, which is shown on the document as \$13.25 per share, and that Wilmington Trust would get proceeds of \$12.62 per share out of the public offering.

Now, the important point about the prospectus is it incorporated everything from the Form 10-K. So the operative document for an investor looking to invest in the capital raise would be to go to the bank's annual report and to read it.

So here are some of the statements that were made in the Form 10-K filed February 22nd of 2010. To mitigate credit risk, we employ rigorous loan underwriting standards and apply them consistently.

Ladies and gentlemen, consider that statement

14:37:36 1 against what the defendants knew at the time about
14:37:38 2 underwriting practices at Wilmington Trust. Typically
14:37:44 3 obtain collateral and personal guarantees from commercial
14:37:47 4 borrowers. And remember all the issues from the evidence
14:37:52 5 that the bank was having from getting updated appraisals
14:37:55 6 during the time period.

14:37:56 7 Regularly review all past due loans, loans not
14:38:00 8 being repaid according to contractual terms, and loans we
14:38:04 9 doubt will be paid on a timely basis. That is the
14:38:08 10 representation to the public, somebody looking to invest in
14:38:12 11 Wilmington Trust stock in February of 2010.

14:38:14 12 What else is set forth in that document? Well,
14:38:18 13 there's a representation about collateral valuations. Our
14:38:23 14 lenders obtain updated valuations, regardless of loan size,
14:38:27 15 any time they believe there has been an obvious and material
14:38:29 16 deterioration in market conditions.

14:38:32 17 And ask yourself, ladies and gentlemen, if the
14:38:36 18 evidence has shown that that was actually what was occurring
14:38:39 19 as of February 22nd of 2010.

14:38:42 20 How do we know that the 90-day past due loan
14:38:45 21 number is important? The bank told investors that it was.
14:38:50 22 And they state in the Form 10-K, this is a document signed
14:38:56 23 by Mr. Harra, signed by Mr. Gibson, and signed by Ms.
14:39:00 24 Rakowski.

14:39:00 25 And they talk about key credit risk metrics.

1 The key measures we use to evaluate our exposure to credit
2 risk include levels of loans past due 90 days or more. And
3 what does the disclosure state happened to 90 past due loans
4 in 2009? They actually tell the public that the amount of
5 loans past due 90 days or more was lower at year-end 2009
6 than it was at year-end 2008.

7 Ladies and gentlemen, that is the false
8 statement for you to consider in terms of the second prong
9 of the securities fraud charge, which is Count 2. This is
10 the alleged materially false statement, the statement which
11 has been proven through the evidence to be, in fact, a false
12 statement.

13 And just in terms of the volume, I mean,
14 remember all the charts that we've seen so far today and
15 over the course of the trial. There's a representation that
16 the past due number is going down. Look how high the past
17 due number was in terms of the relevant waived loans in
18 2009.

19 Another disclosure that's relevant in the 10-K
20 is one relating to generally accepted accounting principles,
21 but specifically the past due loans. And so you will see
22 in the Form 10-K that there's a representation, our
23 critical accounting policies conform with U.S. Generally
24 Accepted Accounting Principles, or GAAP. In the last line
25 it notes, for more information about our critical accounting

1 policies, read note two, summary of significant accounting
2 policies.

3 So if we go to that particular page, and just as
4 a reminder, this is the GAAP provision at issue that Judge
5 Andrews has instructed you would control the policy for
6 reporting past due loans. And it states that the summary of
7 significant accounting policies shall include the policy for
8 determining past due or delinquent status.

9 And, ladies and gentlemen, take a look at this
10 page of the Form 10-K, Footnote 2, where the bank is
11 describing its significant accounting policies relating to
12 loans. Every reference here is to contractual.
13 Contractualize the loan, contractual terms of the loan
14 agreement, all principal and interest delinquencies become
15 current, contractual payments will continue.

16 How would anyone reading this document know
17 about a waiver practice? How would anyone reading this
18 document think that the bank was doing anything other than
19 reporting all loans as past due once they became
20 contractually past due?

21 And in accordance with GAAP, in the footnote
22 disclosed in the financial statement, the bank reported
23 the same 90-day past due number, \$30.06 million in accruing
24 past due loans.

25 What happened? The capital raise was a huge

1 success. It was what they call oversubscribed. There was
2 more of an interest in investors than originally the shares
3 that were allotted. So you'll see there that originally,
4 there was a certain number of shares. They added more
5 shares to it. Ultimately raised \$287 million total, and the
6 proceeds to go to the bank after all of the fees are
7 approximately \$273.9 million.

8 The standard under the scheme to defraud is if
9 it's a false or fraudulent statement or representation that
10 could deceive persons of average prudence. The evidence has
11 shown that no outsiders testified that they knew about the
12 bank's waivers or mass extensions. Jim Corkery from the
13 Federal Reserve. David Fomunyan from the Federal Reserve.
14 John Depman from KPMG. Mac Hodgson from SunTrust, and
15 Michael Schechter from JP Morgan. These were all
16 experienced professionals in the banking and accounting
17 industry, all whom testified and said they were unaware of
18 the waiver practice and they were unaware of the mass
19 extension of loans at year-end 2009 and the first quarter of
20 2010.

21 You heard testimony and saw evidence that the
22 Federal Reserve specifically requested past due loan
23 information, and they didn't get the waivers. And so we saw
24 the first day letter from the Federal Reserve, and in
25 connection with the first day request, there was a request

1 to submit a list of commercial and commercial real estate
2 loans 90 days or more past due which are not on a nonaccrual
3 basis and provide the reason why they are not considered to
4 be nonaccrual.

5 And what did the Fed get in response? And you
6 can see the L-6 designation at the top left. These are
7 loans 90 days past due. They got a list of loans that
8 included loans that were past due because they had matured
9 and were in the process of extension, and based on that
10 list, as you heard Mr. Fomunyan, the understanding from the
11 Federal Reserve was that the bank was reporting matured
12 loans as past due.

13 Mr. Fomunyan also talked about the loan
14 discussions and why this list was important. The Federal
15 Reserve examiners sat down with Mr. North and the
16 relationship managers and they went through each and every
17 single loan on the list to determine if the loan should be
18 reported as past due or reported as nonaccrual.

19 It had to be something, either past due or
20 nonaccrual, and you see some of the handwriting that's on
21 the list showing that they did engage in that process and
22 that the Federal Reserve would have reviewed all of the
23 loans if they would have been -- the evidence shows they
24 would have reviewed all of the loans had they been provided.

25 In the first day letter, there was also a

14:45:26 1 specific request as of March 31st, 2009, for all delinquent
14:45:31 2 loans. And Government Exhibit 213, the bank provided that
14:45:39 3 as well. And it's a little bit difficult to see on the
14:45:42 4 screen, but I can enlarge the last column a little bit.
14:45:46 5 You'll see that this particular document ends with the file
14:45:51 6 date column. There is no waiver column. There is no
14:45:55 7 comments column. This is the information that the Fed got
14:45:59 8 and it did not include the waived loans.

14:46:02 9 When the Federal Reserve came back for the
14:46:06 10 target examination, they requested past due loan information
14:46:09 11 as of September 30th, 2009, one of the largest periods in
14:46:14 12 which there were matured waived loans.

14:46:18 13 And what did the Fed specifically request? A
14:46:21 14 listing of all CRE loans or relationships as of
14:46:25 15 September 30, 2009 that were past due 30 days or more, and
14:46:29 16 specifically references to provide the amount of past due
14:46:33 17 principal.

14:46:35 18 What was provided in response? And this is
14:46:39 19 Exhibit 2 59. A report that had less than a page of 90-day
14:46:47 20 past due loans. There were no waived loans, and there
14:46:52 21 were no waiver columns. And this is a quarter in which
14:46:56 22 the bank waived approximately \$300 million in relevant
14:47:02 23 waived loans.

14:47:04 24 Now, Mr. Corkery and Mr. Fomunyan were -- they
14:47:09 25 were asked about this ALERT data that is sent out in advance

1 of commercial bank's examinations. Both Mr. Corkery and
2 Mr. Fomunyan testified that ALERT is used for one purpose,
3 and that is to create line cards. And we saw examples of
4 the various line cards with the handwriting of Mr. Fomunyan
5 and other examiners.

6 And in their collective years of experience,
7 Mr. Corkery and Mr. Fomunyan testified that they never used
8 the ALERT data for past due loan reporting. In fact, they
9 testified they never saw the ALERT data.

10 And why is that relevant? The Fed specifically
11 requested past due loan information, and so there's no
12 reason at that time to believe that the bank is being and
13 the individuals providing the information are being anything
14 other than truthful.

15 One of the things that was important about the
16 use of the ALERT data. If you recall, that information
17 could not be reconciled back to the call report. There were
18 82 fields of information on the ALERT data. There was one
19 in particular that had FRB information, where normally, if
20 you had information in the call report, that is something
21 that theoretically could have been done. Wilmington Trust
22 did not provide the FRB information, so there was no way to
23 meaningfully reconcile the information back to the call
24 report.

25 And the final point is, it's not easy to find

1 even if you are looking for it. And think back to when
2 defense counsel was sorting through all the ALERT data to
3 try to show it to Mr. Corkery that day. We took at least
4 two different breaks over technical difficulties and trying
5 to figure out which particular loan should be included in
6 the sorting sample and which one shouldn't and to figure out
7 the spreadsheet and to try to get it exactly right. That
8 took a long time to do that with a couple breaks, and that's
9 when everyone knows what to look for. Imagine how hard it
10 is to find if you have no idea what you are looking for, or
11 no reason to question the information that the bank was
12 provided.

13 You also might hear an argument that the Federal
14 Reserve was aware of past due loan reporting because of an
15 audit services report that was provided to Mr. Corkery in
16 connection with the target examination.

17 And Mr. Corkery testified that he did, in fact,
18 receive a copy of an audit services report in January 2010,
19 and he told you that he was evaluating it for form over
20 substance. And let's take a look first at the substance and
21 we'll get back to the form and look at some additional
22 documents.

23 The substance of this document refers to two
24 different spreadsheets of loans and two different lists, one
25 list that is going to have maturity dates through

1 January 1st of 2010, and a second list of loans that are
2 going to mature through April 30th of 2010.

3 If you recall during Mr. Corkery's testimony,
4 after the top document was shown to him by defense counsel,
5 Mr. Corkery was shown a copy of Government's Exhibit 418, a
6 January e-mail that all the defendants are on.

7 And here is the information that wasn't on the
8 audit services document. What was the first list? Well,
9 the first list was 803 matured/maturing loans totaling
10 \$1.3 billion.

11 What was the second list? 450 loans maturing
12 between January 1st of 2010 and April 30th of 2010 totaling
13 \$432 million, and also a reference at the top to decades
14 old problem. None of that information is on the other
15 documents.

16 That is the substance though. Let's get back to
17 the form. That was Mr. Corkery's testimony, that he
18 reviewed the document for form over substance. How do we
19 know that's correct? It's corroborated by the bank's own
20 documents.

21 And so you saw, and this is Government's
22 Exhibit 740. This is a copy of the audit services packet
23 with the agenda for the meeting in January of 2010. It
24 indicates that Ronald Pendleton was going to provide certain
25 information at that meeting.

1 In a later document, you got to see the minutes
2 of the meeting. This is Government's Exhibit 741-R. And
3 what does that state? When Mr. Pendleton is talking about
4 the Federal Reserve, he notes, the second recommendation
5 will be that audit services revise the format of its issues
6 priority report and not remove issues from that report until
7 they are completed, completely consistent with what
8 Mr. Corkery testified is the information in the bank's own
9 meeting minutes of the audit committee.

10 Furthermore, it notes that Mr. Pendleton
11 summarized the particular plan that is referred to as
12 detailed. It doesn't list any particular issues, and notes
13 that in the future, the departments issue priority report
14 "will be in the format the Federal Reserve recommended,"
15 once again, completely consistent with Mr. Corkery and what
16 he testified about the manner in which he was reviewing that
17 particular information.

18 The defendants also showed Mr. Corkery a later
19 version of the audit services report, but just for your
20 purposes and from the record, you can see it. It's Defense
21 Exhibit 441. It's a total packet of 335 pages that include
22 not only the audit services report, but a number of other
23 responses to examination findings.

24 And there's issue 220. But look at the date,
25 July 9th of 2010. This is a letter sent to the Federal

1 Reserve in the third quarter of 2010, well after the capital
2 raise and well after all of the various false statements in
3 call reports, SEC reports, and the monthly regulatory
4 reports.

5 And, ladies and gentlemen, you had a chance to
6 listen to Mr. Corkery and Mr. Fomunyan. You saw them
7 testify. You can evaluate their demeanor, evaluate their
8 credibility, but what Mr. Corkery testified to about the
9 audit services report is corroborated by the bank's owns
10 documents themselves. And ask yourself if Dave Fomunyan and
11 Jim Corkery would have any hesitation of writing up the bank
12 on a particular issue if they knew about it given the manner
13 of the reports and the findings that they provided to the
14 defendant.

15 As we heard from Mr. Corkery, the bank is
16 ultimately given a troubled condition letter by the Federal
17 Reserve in August of 2010.

18 You also heard testimony that KPMG tested past
19 due loan information, and there was a particular work paper
20 that was introduced through Mr. Depman. It was work paper
21 A-60. And you'll see in the upper left-hand corner, the
22 designation PBC, which Mr. Depman testified meant "prepared
23 by client."

24 This is a copy of the bank's past due and
25 nonperforming loans report as of 12/31/2009 that was

1 provided by the bank to KPMG in order to test the accuracy
2 and completeness of past due loans.

3 And what hand as a result of that test? If you
4 recall, Mr. Corkery testified that KPMG tested 25 loans and
5 there were no exceptions noted, so KPMG performs all of the
6 sampling, all of the testing that was set forth under its
7 audit manual and the test passed.

8 And you heard about the ticking and tying and
9 how KPMG would look at particular disclosures and the
10 highlighted portion of Footnote 8 we saw earlier, what the
11 bank reported in 90-day past due loans in its SEC report,
12 \$30.6 million. That is the reference there that they
13 followed from this internal report all the way to the SEC
14 report.

15 And Mr. Depman further testified that part of
16 the test program was to get a printout from the Shaw system
17 from a bank employee, and, again, the PBC designated,
18 prepared by client. So this would have been a screen shot
19 of the Shaw system as he testified provided by a bank
20 employee to verify that the information on the past due
21 report was accurate.

22 Now, you also saw an exhibit introduced by the
23 defendants relating to a Wilmington Trust e-mail account
24 that was set up for KPMG, a general inbox, and you saw two
25 different e-mails from January of 2010.

1 There is the designation of the KPMG at
2 WilmingtonTrust.com inbox. This was a document that was not
3 in KPMG's work papers. As you can see from the Bates stamp,
4 it was provided by Wilmington Trust Corporation. This
5 particular office, consolidated office or statistics report,
6 Mr. Depman testified, never saw before, KPMG didn't test
7 before. And the language that was highlighted by defense
8 counsel was something about an adjustment due to the waived
9 loans in the delinquency section of the report.

10 Again, Mr. Depman testified he had no idea what
11 was a waived loan. He had frequent interaction with each of
12 the defendants, particularly defendants Gibson and Rakowski,
13 was never told about waived loans, was never told about mass
14 extensions. And so when you look at that e-mail, sent to
15 the general inbox, no meaningful description of waived
16 loans.

17 They replaced an e-mail that was sent two days
18 earlier to the general inbox. It was not in KPMG's work
19 papers. It was not sent by the defendants. And it wasn't
20 sent to John Depman, and certainly these four defendants
21 knew how to find him. And you saw that we introduced
22 certain e-mails that were sent by the defendants to Mr.
23 Depman.

24 Something else you might hear about relating to
25 KPMG is whether they were aware of maturities based on a

14:58:08 1 letter that they sent to the bank in the early part of 2010.

14:58:12 2 As Mr. Depman testified, KPMG identified a
14:58:15 3 deficiency relating to loan maturities, but what he said
14:58:21 4 was, that was from a risk rating standpoint, and they did
14:58:24 5 further testing that passed.

14:58:26 6 And so we showed certain documents, and start
14:58:30 7 with one e-mail that you might see from the defense
14:58:31 8 attorneys in their closing. And the e-mail from Jason
14:58:37 9 Delozier dated January 15, 2009, and relates to a number of
14:58:41 10 matured loans that are on the system. It is doesn't explain
14:58:47 11 whether these loans are 30 to 89 days past due, or 90 days
14:58:50 12 due, or anything. But Mr. Delozier, who Mr. Depman
14:58:52 13 testified was not involved in the past due reporting
14:58:55 14 process, writes specifically questions about whether the
14:58:57 15 loans were properly risk rated and whether or not a pass
14:59:02 16 rating would be appropriate.

14:59:04 17 And so this particular finding makes its way
14:59:07 18 into a letter that was sent to the bank in February of 2010.
14:59:14 19 And what does it say? We noted certain loans on the system
14:59:17 20 with past due maturity dates. We recommend loans past their
14:59:22 21 maturity date be reviewed by the company's credit review
14:59:25 22 section, that's Mr. Infanti and Ms. Thuresson. Such loans,
14:59:31 23 if performing, should be considered for technical watch
14:59:33 24 status.

14:59:34 25 And so the issue identified by KPMG has nothing

1 to do with past due loan reporting. They did a separate
2 test for that, which passed. This relates to risk ratings.

3 And I mentioned a minute ago that KPMG did
4 further testing of the deficiency that they identified.
5 That's also reflected in the work papers, where Mr. Depman
6 testified every deficiency would be included in a chart to
7 see what they did with the information.

8 And so the description, as we noted certain
9 loans on the system with past due maturity dates that were
10 not being addressed by management. And the same document
11 has what the further testing was. They did what auditors
12 do. They selected a sample and verified that they had
13 extension agreements in place. No exceptions noted.

14 So even for that deficiency, KPMG just didn't
15 stop the process. They did further testing, and the
16 testing passed. And you heard from Mr. Depman that you
17 can't review every single piece of paper of a client.
18 You test to find if there are problems, and the past due
19 loan testing passed, and the matured loans that were
20 sampled passed as well.

21 Now, just as important relating to this issue is
22 what the defendants thought that KPMG knew. And so one of
23 the exhibits shown to Mr. Depman was a memo to the audit
24 committee that was co-authored by defendant North and
25 defendant Rakowski in April of 2010, in which the subject is

15:01:09 1 response to KPMG comments.

15:01:13 2 And so that document includes the specific
15:01:17 3 comment that KPMG made about loan review, about certain
15:01:21 4 loans with past due maturity dates. And look at what the
15:01:24 5 management response was to this document drafted by
15:01:27 6 defendant North and defendant Rakowski. They note that
15:01:30 7 loans of past due maturity will be considered for review by
15:01:33 8 the credit review division and placement on technical watch
15:01:37 9 status.

15:01:39 10 So if there's an argument about intent or that
15:01:42 11 the defendants thought that KPMG knew about the matured
15:01:46 12 loans issue, two of the four defendants write a memo in
15:01:50 13 which they're expressing their knowledge and intent of
15:01:52 14 what the issue is. And so this response doesn't mention
15:01:59 15 AS220. It doesn't mention the two lists, or it doesn't
15:02:04 16 mention as of April of 2010, a new way of reporting past
15:02:09 17 due loans. It's consistent with Mr. Depman's testimony that
15:02:13 18 everyone thought that this issue related to risk ratings,
15:02:16 19 and most importantly, that is what two of the defendants
15:02:18 20 thought.

15:02:19 21 Now, Mr. Depman was shown the document from
15:02:26 22 audit services which had the information about a new way of
15:02:29 23 reporting past due loans as of March 31st of 2010. He
15:02:33 24 testified that he was unaware of it and had not -- was
15:02:37 25 unaware of that particular provision within the report.

1 There's further corroboration for that as well,
2 and so there's a Defense Exhibit 706, which is the bank's
3 own meeting minutes of the audit committee that were
4 provided to KPMG, and this is the audit committee meeting
5 where that audit services 220 issue would have been
6 discussed.

7 And so what does it say? That Mr. Pendleton
8 reviewed the issues priority report, that he summarized the
9 specific issues coded in red in the report.

10 If you recall, we walked through this with Mr.
11 Depman. There were four red issues and they were all
12 Priority one audit issues.

13 And so going back to AS220, that was a Priority
14 2 issue. So according to the bank's over documents in terms
15 of the meeting minutes of the audit committee, this specific
16 issue was not discussed. It was not a red issue.

17 Now, what else did Mr. Depman testify about
18 internal audit? Another exhibit that was introduced by
19 defendant Gibson's counsel, it's Defendants' Exhibit 395,
20 and it was the KPMG audit manual relating to, among other
21 things, the evaluation and testing of the work of the
22 client's internal audit services.

23 And it notes in the audit manual, when we intend
24 to use specific work of internal auditing, we should
25 evaluate and perform audit procedures on that work to

1 confirm its adequacy for our purposes. And furthermore, we
2 should compare the results of our work with that done by
3 internal audit. The extent of this work will depend on the
4 circumstances and should allow for us to make an evaluation
5 of the overall quality and effectiveness of the internal
6 auditor's work being considered by us.

7 And so the defendants introduced another exhibit
8 which came from KPMG's work papers relating to how they
9 evaluated internal audit during the course of the 2009
10 audit. And it states specifically, we would not plan to use
11 the work of audit services except in a direct assistance
12 capacity. And all that meant is, they sent out letters to
13 clients and borrowers to confirm information.

14 So that's an important context for you all to
15 consider in terms of how KPMG considered internal audit in
16 connection with the 2009 examination, how KPMG used internal
17 audit.

18 Mr. Depman testified that they did not test the
19 audit services report and they did not substantively rely on
20 internal audit in any way. And that is, ladies and
21 gentlemen, reflected in their own work papers in an exhibit
22 that was introduced by the defense.

23 What did Mr. Depman rely on? He relied upon
24 representations of the defendants. And so we introduced the
25 management letter that would be sent to KPMG from Wilmington

1 Trust personnel in making certain representations, signed by
2 defendant Gibson and defendant Rakowski. A second
3 representation sent March 1st, 2010, in connection with the
4 capital raise, making certain representations, again, signed
5 by defendant Gibson and defendant Rakowski.

6 Mr. Depman testified he met pretty frequently
7 with each of the defendants. He met most frequently with
8 defendant Gibson and defendant Rakowski, would ask
9 particular questions, and we'll see in a bit some of the
10 specific questions that were asked on a quarterly basis.

11 Stock analysts like Mac Hodgson also would ask
12 questions about the commercial loan portfolio.

13 So Government's Exhibit 427 is a question from
14 Mr. Hodgson where he's talking about the fact that the loan
15 portfolio is not declining. It's an e-mail that was
16 addressed, among others, to Mr. Gibson, Mr. North.

17 And he states, "Investors assume that banks are
18 kicking the can down the curb and will have to realize
19 greater losses in future quarters." This is an outside
20 analyst asking specific ever questions relevant to past due
21 loans and loan extensions.

22 You also saw during Mr. Hodgson's testimony that
23 he asked a specific question of defendant North in the
24 course of the earnings call for the first quarter of 2010,
25 where initially there was a question about, specifically

1 about 90-day past due loans.

2 And Mr. Hodgson asked: You mentioned that the
3 90-day past due loans was driven by real estate construction
4 loans that matured, that hadn't paid off and you guys are
5 obviously working on extensions.

6 Then he asked the question: The response from
7 Mr. North is, the profiles of these credits aren't
8 necessarily credits with issues or problems when four months
9 earlier, there was a reference to some of these same exact
10 loans as credit turds. They were extended year-end 2009,
11 and once again, extended on the last week end in March in
12 2010.

13 And, finally, the underwriters asked specific
14 questions about the loan portfolio.

15 And you've seen now several times the business
16 due diligence and the certain questions that were asked
17 about credit underwriting guidelines, loan modification,
18 delinquencies, and the chart that was prepared for the
19 underwriters in order to market the capital raise.

20 Now, each of the counts of 1, 2 and 4 to 16 of
21 the indictment have certain elements that are common to
22 them, such as the defendant must act knowingly, and
23 depending on the offense either with an intent to defraud or
24 to deceive.

25 For certain counts, there's a requirement of

1 willfulness. There's also for certain counts a requirement
2 of materiality.

3 And you can review the specific instructions
4 provided by the Court for knowingly, willfully, intent to
5 defraud and intent to deceive, but one thing of importance
6 with respect to the willfully instruction, and that is at
7 the bottom, the last paragraph, last sentence. Willfulness
8 requires an awareness that conducts was unlawful. It does
9 not require proof that the actor knew of the existence and
10 meaning of the specific statute or regulation making his or
11 her conduct criminal. It's awareness in the general sense
12 that the conduct is unlawful.

13 MR. BREEN: Objection.

14 THE COURT: Overruled.

15 MR. KRAVETZ: And so ultimately, the Court's
16 instruction will control in that area.

17 Now, certain counts do not require proof of
18 willful conduct, and it's important that you consider
19 those counts under the standard that doesn't require
20 willfulness.

21 And those counts are 7 to 10, false entries in
22 banking records, and that is a charge that's against all the
23 defendants.

24 And Count 17 to 19, which is making false
25 certifications in financial reports, and that relates to

15:10:19 1 defendant Gibson.

15:10:20 2 Now, the Court also provided an instruction on
15:10:25 3 intent to defraud, which means to act knowingly and with the
15:10:30 4 intention or purpose to deceive or to cheat. In considering
15:10:33 5 whether a defendant acted with an intent to defraud, you may
15:10:36 6 consider, among other things, whether the defendant acted
15:10:38 7 with a desire or purpose to bring about some gain or benefit
15:10:42 8 to himself or herself or someone else, or with a desire or
15:10:47 9 purpose to cause loss to someone else.

15:10:51 10 And, again, when you are thinking about the
15:10:53 11 intent to defraud at issue here, certainly, the bank is
15:10:57 12 receiving a benefit by the false past due loan reporting,
15:11:02 13 and that applies to all of the call report information as
15:11:09 14 well as the securities filing in which investors invested
15:11:13 15 \$287 million in the capital raise.

15:11:17 16 Another mental state is intent to deceive, and
15:11:22 17 that relates to Counts 4 and 6 and 7 to 10. And as the
15:11:25 18 Court has instructed you, to act with an intent to deceive
15:11:29 19 means to act with intent to deceive or to cause a person to
15:11:35 20 believe that which is false. So it is a different -- again,
15:11:36 21 the Court's instruction controls, but it's a different
15:11:38 22 standard than intent to defraud. Unlike in intent to
15:11:41 23 defraud, there's no requirement to bring about a gain or for
15:11:44 24 benefit or to cause a loss. It's simply to act with an
15:11:48 25 intent to deceive, to mislead someone to believe that which

15:11:52 1 is false.

15:11:56 2 The Court also provided an instruction on
15:11:58 3 accomplice liability, and this instruction is important to
15:12:03 4 the counts relating to defendant North, who did not actually
15:12:07 5 sign the call report, the call reports, the SEC reports, or
15:12:14 6 the monthly regulatory reports. And it's also relevant to
15:12:17 7 certain counts relating to defendant Rakowski, where she did
15:12:20 8 not sign the specific document.

15:12:22 9 So as the Court has instructed you, it's a
15:12:27 10 four-part test. One or more of the principals committed the
15:12:30 11 offense.

15:12:31 12 Two, the defendant knew that the offense charged
15:12:33 13 was going to be committed or was being committed by the
15:12:37 14 principal.

15:12:38 15 Three, the defendant knowingly did some act for
15:12:41 16 the purpose of aiding, assisting, facilitating, or
15:12:52 17 encouraging the principal in committing the specific offense
15:12:55 18 charged, and with the intent that the principal commit that
15:12:58 19 specific offense.

15:12:58 20 And, four, that defendant performed an act in
15:13:01 21 furtherance of the offenses charged.

15:13:03 22 We are going to talk about Mr. North's conduct
15:13:05 23 in a minute. It's important to understand the standard as I
15:13:09 24 do so.

15:13:09 25 As I mentioned, the principals are listed as the

1 Wilmington Trust Corporation, defendant Harra, defendant
2 Gibson as to all the counts. Defendant Rakowski is a
3 principal as to particular counts, counts where she signed
4 the documents, and there's a listing of the counts where
5 accomplice liability applies.

6 Now, the Court also instructed on the standard
7 for materiality, and His Honor gave you two different
8 standards, depending on the type of document at issue.

9 The first is a substantial likelihood that a
10 reasonable investor would have viewed the information as
11 having significantly altered the total mix of information
12 available, and that relates primarily to the
13 securities-related offenses.

14 And the second is a natural tendency to
15 influence, or was capable of influencing the actions of the
16 decision-making body to which it is directed. That's
17 Counts 5 and then 7 to 16. Most of those counts relate to
18 where the false statement is made to a federal agency. It's
19 not relating to an investor, but the issue relates to the
20 governmental entity.

21 Now, you will have the opportunity to review a
22 stipulation that the parties entered into. It's marked as
23 Exhibit S-6. And essentially, the defendants and the
24 Government agreed that the amount of 90 days past due loans
25 was material for purposes of how His Honor instructed you on

1 that standard.

2 And in particular, I will just read from Count
3 1, but you'll see there's similar language for the other
4 counts. That the Government is required to prove with
5 respect to Count 1 that the quantity of loans that were past
6 due for 90 days or more were material. The Court will
7 define material and materiality in its final instructions.
8 The parties stipulate and agree that those statements are
9 material and the Government does not need to produce any
10 additional evidence beyond this stipulation to establish
11 materiality to Count 1. And you'll see that there are
12 similar representations to each of the counts in the
13 indictment.

14 That brings us to a discussion of the individual
15 defendants, and we'll start with defendant North.

16 Defendant North was the individual at Wilmington
17 Trust who approved waived loans. You heard the testimony
18 from Mr. Cummings that Mr. North approved the waived loans,
19 would do so either orally or in person or in writing via
20 e-mail. And it was the waiver decision and the sign-off to
21 Mr. North that would ultimately go to the finance
22 department, the controller's group, and be incorporated into
23 the past due and nonperforming loan report.

24 In terms of mental state, we talked about some
25 of the e-mails earlier that have bearing on Mr. North's

1 knowledge, intent, and willful conduct. The example of the
2 one from June of 2008, noting his awareness that matured
3 loans were something that were extremely important and that
4 they would have an impact on the second quarter numbers,
5 what was being reported publicly.

6 We saw Government Exhibit 445 and 446,
7 describing what the standard was and the ultimate goal,
8 which was to report a true past due number that would not
9 contain any matured loan.

10 And another e-mail from Mr. Cummings that he
11 sent to Mr. North, and this is Government Exhibit 448,
12 October of 2009, where Mr. Cummings is sending information
13 to Marian Fean from internal audit, and at the bottom notes,
14 I am choosing to intentionally not discuss the waiving of
15 the reporting for regulatory and financial purposes. Any
16 comments would be appreciated.

17 Mr. North made certain adjustments to the e-mail
18 before it went out, and that's reflected in bold, but
19 nothing with respect to that specific comment.

20 And if you recall, Mr. Cummings testified that
21 he sent that e-mail to Mr. North to cover himself.

22 Mr. North was also aware of the monthly
23 regulatory reports and the requirement to report past due
24 loans to the Fed on a monthly basis. If you recall through
25 the testimony of Mr. Brewer, there was a big enforcement

1 binder that Mr. North left for Mr. Brewer when he took over
2 defendant North's job functions, and contained within that
3 binder was a letter, a draft of a letter from November of
4 2009 that ultimately went to the Federal Reserve, reporting
5 out the monthly regulatory report for October of 2009.

6 We saw earlier the technical deficiencies that
7 were identified by the Federal Reserve. Mr. North was the
8 chief credit officer of the bank, and although you certainly
9 cannot consider bank policies, violation of bank policy as
10 to whether someone committed a crime or evidence of
11 violation of bank policy is not alone criminal activity, you
12 can certainly Mr. North's knowledge of the level of
13 noncompliance with bank policies when you are considering
14 his knowledge, his intent, and whether he acted willfully
15 with respect to the reporting of past due loans.

16 We also have evidence that Mr. North received a
17 copy of and provided edits to the specific disclosure
18 relating to past due loans in the SEC report, and this was a
19 document that came in through Ellen Roberts. As you can
20 see, the subject is credit risk section, and it was the
21 specific section in the Form 10-K that related to past due
22 loans. And Ms. Roberts noted that it was a pre-draft, that
23 she was including Mr. North on the distribution. And Mr.
24 North provided certain comments, and I believe you saw
25 through the evidence what those comments were.

1 But the important thing is, Mr. North received a
2 copy of the MD&A section. He was aware of the information
3 that was contained within the MD&A section that had the
4 specific disclosures relating to 90-day past due loans, and
5 he took the time to read it and to provide comments.

6 We also know that Mr. North was involved in the
7 business due diligence for the underwriting process, and,
8 once again, the specific questions that were asked during
9 that process.

10 An e-mail, Government Exhibit 543. This is the
11 last weekend in March of 2010, an e-mail from Mr. North to
12 defendant Harra and several other bank employees, talking
13 about the extension of 176 loans on the last weekend in
14 March of 2010, and he refers to what they are dealing with
15 as the matured loans beast and also a fire drill.

16 And we note from the evidence that Mr. North is
17 also someone who would talk to investors. Once again, the
18 e-mail from Mac Hodgson asking specific questions about
19 relevant loan information. And we previously saw the Q&A
20 from the transcript of the earnings call where Mr. North is
21 someone who is answering questions from investors during the
22 call at the end of the first quarter of 2010.

23 And the last document with respect to Mr. North
24 in this section. If you recall, he wrote a memo in March of
25 2010 that was entitled "Tomorrow's meeting," and

1 specifically, it was a memo relating to matured loans.

2 And that memorandum referenced the issues that
3 the bank was experiencing, continuing to experience relating
4 to matured loans in the first quarter of 2010. And he notes
5 the lack of information and the overall magnitude of the
6 undertaking, and states near the end of March, there is
7 simply no way that the lenders will be able to complete
8 full reviews and analyses of all of these matured/maturing
9 loans in Delaware commercial real estate to match the pace
10 of maturities over the next couple months.

11 And says in the end, in addition to it's
12 imperative that these extensions be followed up by the
13 full execution of any required document, I would also
14 suggest that we share this game plan with Jim Corkery at
15 the Fed. And the evidence introduced at trial is that he
16 never did.

17 And the follow-up e-mail to Mr. Harra saying,
18 What we don't want are the Feds seeing a skew of matured
19 loans on Shaw. They're never commented on the matured in
20 the past. I want to give them no opportunity in the future.
21 Again in considering the good faith of defendant North, in
22 considering his intent, whether he thought that the Federal
23 Reserve was aware of all of these issues, the e-mail is
24 really important. It's dated March 25th of 2010.

25 Next is defendant Rakowski. Defendant Rakowski

1 was the bank's controller. You've seen information and
2 documents that defendant Rakowski was proficient in
3 accounting guidance. This particular document, Government's
4 exhibit, discusses an agenda of a disclosure committee
5 meeting where Ms. Rakowski was talking about Guide 3.
6 Remember Guide 3 is the industry guide that contains the
7 specific disclosure relating to past due loans.

8 We also saw introduced through Mr. Depman that
9 Ms. Rakowski would write detailed accounting and regulatory
10 memoranda on a quarterly basis that would discuss changes in
11 GAAP or regulatory reporting or income tax reporting over
12 the quarter, and would list how the bank was going to deal
13 with those changes going further.

14 Ms. Rakowski was also the relevant person.
15 She was the main point of contact for KPMG when KPMG would
16 have requests relating to how accounting policies were
17 applied at Wilmington Trust.

18 And you saw two examples of these inquiry
19 documents that Mr. Depman testified there were specific
20 questions that would be asked of Ms. Rakowski and/or
21 Mr. Gibson every quarter, such as whether there are any
22 new accounting policies, any new or changes to non-GAAP
23 policies, any changes in accounting policy, all information
24 that Ms. Rakowski was inquired of by KPMG during the
25 relevant time period. And the testimony was that she never

1 disclosed the waiver practice or any of the iterations in
2 the policy of the waiver practice or the fact that there
3 were extensions.

4 Ms. Rakowski was aware of the findings of the
5 Federal Reserve in September of 2009. If you recall, one of
6 the documents in her desk file was a letter dated
7 September 26th of 2009 that had some of the same specific
8 findings that were contained in the exam report relating to
9 use of interest reserves and extensions, working capital
10 lines of credit. And that's the same information that we
11 saw earlier that was in Government's Exhibit 221-R.

12 In addition, Ms. Rakowski was aware of the
13 requirement for the bank to report matured loans on a
14 monthly basis to the Fed after the 2009 examination.

15 If you recall, there's a really important
16 e-mail, Government Exhibit 524, and you're going to have a
17 chance to see the actual version of the document. This is
18 the document that came from, was introduced through the
19 records custodian of the bank. It came in through, it was
20 represented that it came in through Ms. Rakowski's desk
21 files, and there was the handwriting at the top of the
22 document.

23 This is the document displayed on the screen.
24 And it starts with a question sent by Mico Slijepcevic,
25 where it states specifically, the regulators have asked

1 that we provide the past due report to them on a monthly
2 basis.

3 And near the bottom it states, Kevyn Rakowski
4 has asked if you could break down the waivers that were made
5 in September by category for the 30 to 89 and the over 90
6 bucket separately. The two waiver categories she is asking
7 for are dollar amount of waivers related to matured loans,
8 dollar amount of waivers for other reasons.

9 So there's no question that the individual at
10 the bank responsible for accounting policies is the bank's
11 controller, is aware at the end of September of 2009 that
12 the bank is engaged in a waiver practice relating to matured
13 loans.

14 And what's is the response? The response is
15 effectively that there are \$338 million worth of waived
16 loans in that category in the third quarter of 2009.

17 And that particular e-mail is so important that
18 it's printed out from Ms. Rakowski's Outlook inbox. You can
19 see Kevyn N. Rakowski in the upper left, signifying exactly
20 that it was actually printed out. It was retained in Ms.
21 Rakowski's desk file, and the handwriting on top
22 specifically relates to the following. "Regulators asked
23 for past due in call report. That is everything." And
24 there's emphasis on the word "past due." It's underlined.

25 In addition, Ms. Rakowski is on Government

1 Exhibit 418, where there is the discussion of the mass
2 extensions and the fact that loans that were extended at
3 year-end 2009 did not have the proper needed level of
4 underwriting required, that they weren't supported by
5 thorough analysis in underwriting.

6 And Ms. Rakowski was aware at year-end 2009 that
7 there were significant problems with the bank's commercial
8 real estate and construction portfolio. This is an e-mail
9 from defendant Gibson to Ms. Rakowski dated Monday,
10 December 28th, 2009, where it's referring to the poor
11 results for the loan portfolio for this quarter, and the
12 fact that Mr. Gibson wanted to initiate a very deep dive
13 into the details and performance characteristics of the
14 CRE/construction book.

15 And he writes further, we have a credibility
16 GAAP if we can't provide a better picture of the portfolio
17 given the large provision we expect in the rise in NPAs, or
18 nonperforming assets. So, again, information, relevant
19 information that Ms. Rakowski has relating to that specific
20 segment of the loan portfolio at year-end 2009.

21 And Ms. Rakowski is also aware of information
22 coming out of the surge process, and the fact that in the
23 first month of January alone, there's a reduction of
24 \$446 million in loans that had been rated pass.

25 There's evidence that Ms. Rakowski was involved

1 in meetings relating to the capital raise, and that Ms.
2 Rakowski received copies of the MD&A credit risk section,
3 the specific section of the Form 10-K that contained the
4 90-day past due loan information.

5 Ms. Rakowski signed the Form 10-K in her
6 position as senior vice president and controller, and she
7 wasn't surprised by the different findings from internal
8 audit relating to that audit services 220 issue.

9 Ms. Rakowski receives a copy of the document,
10 forwards it to Mr. Gibson and says, don't think that this is
11 a surprise, but did not see either of you on the
12 distribution list.

13 And for the amount of time that defense counsel
14 spent on audit services issue 220 in this particular case,
15 look at the individual at the bank who is responsible for
16 AS220 from finance. It's not Marty McDonough, it's not
17 Mico Slijepcevic. It's one person and it's Kevyn Rakowski,
18 the controller, and that's the bank's own documents.

19 Your Honor, I see I'm at 3:30, if it's time for
20 a break.

21 THE COURT: All right. Thank you, Mr. Kravetz.

22 Ladies and gentlemen, we'll take an afternoon
23 break for 15 minutes until quarter of four.

24 (The jury was excused for a short recess.)

25 THE COURT: All right. Everyone may be seated.

1 Mr. Kravetz, what's your estimate now?

2 MR. KRAVETZ: I run through the last two
3 defendants, then talk about conspiracy, then that's the end,
4 Your Honor.

5 THE COURT: All right. So that's not very
6 helpful.

7 MR. KRAVETZ: I realize that.

8 THE COURT: Okay. Well, so, Mr. --

9 MR. KELLY: What did you say?

10 MR. KRAVETZ: I said I realize it's not helpful.

11 MR. DALTON: I didn't hear it. I'm sorry.

12 MR. KRAVETZ: I think it's likely 4:30.

13 THE COURT: Okay. So, Mr. Kelly, the jury has
14 indicated that they really can't stay past 5:00, so I'm
15 perfectly happy if you want to just adjourn for the day when
16 Mr. Kravetz is finished, or -- I'm happy to do whatever you
17 want, but if you start talking and you are not finished at
18 5:00, we're going to break and continue again tomorrow
19 morning. And if you want to think about that, you can tell
20 me in ten minutes, that would be fine, too.

21 MR. KELLY: That would be great, Your Honor.
22 Let me think about it.

23 THE COURT: Okay.

24 (Short recess taken.)

25 - - -

(Proceedings resumed after the short recess.)

THE COURT: Mr. Foley?

MR. FOLEY: Your Honor, piggybacking off of Mr. Breen's objection, we're asking for a curative instruction regarding the -- when the Government was talking about willfully, they added in that it simply requires that the defendant have a general sense of wrongdoing, and in the prayer discussion, that phrase was discussed, it was removed, but the jury then heard it anyway.

THE COURT: Well, I removed it because I didn't think it was necessary. I didn't think it was wrong. It's a Court of Appeals opinion.

MR. FOLEY: Well, it dilutes the standard because it does, we think, require that they knew that the conduct was unlawful, and when you give this sort of just general sense of wrongdoing, it's diluting it.

So I think it was a misstatement. It was taken out of the instruction during the prayer conference, and I think it's a pretty critical remark.

THE COURT: Well, I'm not going to do anything right now. I will get the transcript and see what the context was, but the fact that it's said in a general sense by itself to me gets you nowhere, and if it was said with wrong words around it, that would be something else.

MR. NOWAK: In addition, Your Honor, was

1 displayed for the jury was what was a purported jury
2 instruction concerning the statement of half-truths. As you
3 might recall --

4 THE COURT: No. That I recall perfectly well,
5 Mr. Nowak. You are right. And I took it that there was a
6 prepared slide. Mr. Kravetz didn't say anything about it.
7 It was not up there very long. No juror could possibly have
8 said, hey, wait a second, there are four extra words there,
9 so I propose to do nothing about it.

10 There's nothing I can do about it that would,
11 like, help you.

12 MR. NOWAK: Okay.

13 THE COURT: Right?

14 MR. NOWAK: We may do something about it in our
15 closing.

16 THE COURT: Well, if you choose, you choose, but
17 I mean, you are perfectly right.

18 And I don't think -- Mr. Kravetz, I take it you
19 just had that prepared.

20 MR. KRAVETZ: I didn't read that and talk
21 specifically about the other prong of Count 2.

22 THE COURT: No, and I know you didn't read it,
23 and you did read -- it had two bullet points on the same
24 slide, so, yes. Just an unfortunate thing, but nothing that
25 makes an a material impact on anything.

1 But if you want to bring it up in your closing
2 to say it's not concealment, yes, sure, go ahead, or
3 something.

4 MR. NOWAK: It's not in the instructions.

5 THE COURT: It's not in the instructions, right.

6 MR. NOWAK: What you are shown by the Government
7 is not one of the instructions.

8 THE COURT: I'm sorry. What?

9 MR. NOWAK: What you are shown by the Government
10 is not one of the instructions.

11 THE COURT: All right.

12 MR. NOWAK: I'm not -- I'm just considering it.

13 THE COURT: All right. Well, why don't you just
14 let me know what you are planning on doing. But, you know,
15 it was shown to them.

16 MR. KRAVETZ: Your Honor, page 52, you
17 instructed the jury, in addition, deceitful statements of
18 half-truths for the expression of opinion may constitute
19 false --

20 THE COURT: Right. But you had the words
21 concealment of something or other.

22 MR. NOWAK: Material fact.

23 THE COURT: Four words that I took out.

24 MR. KRAVETZ: Oh.

25 THE COURT: I mean, I think you corrected it,

1 even though I took it out until just now, but it was taken
2 out.

3 MR. NOWAK: Additionally, the instruction is
4 knowledge of the statute giving rise to criminal conduct
5 does not need to be shown. It doesn't say anything about
6 regulation, knowledge as a regulation.

7 THE COURT: I'm sorry, Mr. Nowak. I'm not sure
8 what you are talking about now.

9 MR. NOWAK: Okay.

10 MR. FOLEY: I know, Your Honor. That was under
11 willfully, is the Government correctly read the sentence
12 that says, willfully does not require proof that the actor
13 knew of the existence and meaning of the statute of making
14 his or her conduct criminal. That's Third Circuit. But
15 what the Government did, they said statute or regulation.
16 They threw that in there, and that's a misstatement of the
17 law. That takes it another whole step.

18 MR. NOWAK: That's contrary to the other
19 instruction you gave the jury about violations of
20 regulation, not --

21 THE COURT: I'm not going to do anything right
22 now. What I heard did not offend me, so to speak. I will
23 get a transcript tonight and look at it. We can deal with
24 it tomorrow morning.

25 I'm not going to do anything right now. Based

1 on what seemed to me just listening to it, would be fine. I
2 do appreciate maybe I didn't catch everything.

3 MR. FOLEY: Thank you, Your Honor.

4 MR. NOWAK: Thank you.

5 THE COURT: Are we ready to proceed? Mr. Kelly?

6 MR. KELLY: Depending on when Mr. Kravetz
7 finishes, I personally do the no mind starting and then
8 finishing, if that's okay with Your Honor.

9 THE COURT: It's okay with me.

10 MR. KELLY: All right.

11 THE COURT: I want to do whatever you want to
12 do. You can make a game time decision.

13 MR. KELLY: Thank you, Your Honor.

14 THE COURT: All right. Go ahead. Let's get the
15 jury.

16 (The jury entered the courtroom.)

17 THE COURT: All right, members of the jury.
18 Welcome back. Everyone, you may be seated.

19 Mr. Kravetz, you may proceed.

20 MR. KRAVETZ: Thank you. Good afternoon again.

21 Let's talk next about defendant Gibson.

22 Defendant Gibson was the CFO at Wilmington Trust. He served
23 Wilmington Trust for more than 20 years, was the CFO, named
24 the CFO in 1996.

25 Mr. Gibson had degrees from two of the top

1 universities in the country, the University of Delaware, and
2 an MBNA in finance and accounting from Vanderbilt. The
3 evidence shows that Mr. Gibson was a very experienced banker
4 and CFO.

5 Now, the evidence has also shown that Mr. Gibson
6 was aware of all of the findings that were presented by the
7 Federal Reserve. Mr. Gibson was in the exit meeting, the
8 2009 full scope examination, the 2010 target examination,
9 and was aware of what was happening in connection with the
10 2010 full scope examination. So all of the findings from
11 the Federal Reserve we looked at this morning, that was all
12 information that was shared with Mr. Gibson.

13 Mr. Gibson was also the principal person at
14 Wilmington Trust who signed the call reports, and in
15 particular, an attestation on the call report that states,
16 I, the undersigned CFO of the named bank, attest that the
17 reports of the condition and income, including the
18 supporting schedules, Schedule RC-N, for this report date
19 have been prepared in conformance with the instructions
20 issued by the appropriate federal regulatory authority and
21 are true to the best of my knowledge and belief.

22 And you've seen the evidence relating to
23 schedule RC-N in the reporting instructions, and His Honor
24 instructed you as to what those reporting requirements
25 mean.

1 In addition, Mr. Gibson signed the Form 10-K.
2 He also signed a number of other certifications, including a
3 certification relating to management's report on internal
4 controls over financial reporting, a document or a piece of
5 the Form 10-K also signed by Mr. Harra.

6 Mr. Gibson also signed the Section 1350
7 certification, and we'll see the specifics of that in a few
8 moments.

9 And there was an additional Rule 13(a)
10 certification signed by Mr. Gibson in connection with the
11 10-K, and it states, and I quote, "Based on my knowledge,
12 this report does not contain any untrue statement of a
13 material fact or omit to state a material fact necessary to
14 make the statements made in light of the circumstances under
15 which such statements were made, not misleading with respect
16 to the period covered by the report." And that's the period
17 of 2009.

18 In addition, Mr. Gibson is aware not only of the
19 waiver practice, but the magnitude of waived loans. This is
20 an e-mail dated November 16th, 2009. It was sent by
21 defendant Rakowski to defendant Gibson, contained the
22 attachment for the October 31st, 2009, delinquency report,
23 the report that was approved by Mr. North. And that portion
24 of the e-mail states, we did pull the waived loans from the
25 past due report.

1 So not only does Mr. Gibson have the attachment
2 forwarded to him which has all the information contained
3 therein, but the controller, the person who works directly
4 for him, is telling him, we did pull the waived loans.
5 They are not included in what we are reporting to the
6 public.

7 Mr. Gibson also spoke on behalf of the bank, and
8 not only did he speak on behalf of the bank, he made certain
9 statements relating to past due loans.

10 This is an important exhibit, Government
11 Exhibit 544, and it goes to Mr. Gibson's knowledge of
12 whether matured loans are past due.

13 And so you see at the bottom of the document,
14 it's an e-mail from Mr. Gibson to Mr. North and Ms. Towe on
15 July 7th of 2010. The subject is matured loan affecting
16 delinquency and Fed pledged loans.

17 Mr. Gibson writes: What does approved but not
18 documented mean? Don't we document the approval? Clearly
19 just matured and current does not cut it.

20 And so Mr. North responds. I mean that we've
21 approved it internally, in the normal channel, but any
22 needed loan documentation has not been drafted and executed.

23 And what is Mr. Gibson's response? Those are
24 past due. We need those loans where we have executed
25 agreements.

1 It gets back to some of the concepts that we
2 talked about this morning, the falsity of the past due loan
3 reporting, and the fact that everyone within the bank, at
4 least the four defendants, were aware that documents were
5 required, executed documents in order to validate, extend
6 loans.

7 I mention that Mr. Gibson spoke on behalf of the
8 bank as the CFO. He would spoke in roadshows. He would
9 spoke during the course of earnings calls. This is an
10 earnings call as of July 23rd of 2010, where the bank is
11 reporting its results for the second quarter of 2010.

12 Mr. Gibson is asked a very specific question:
13 Could you provide some color on why you determined that the
14 90-day delinquency loans should not go into nonaccrual
15 status because, again, it has to be one or the other. It's
16 either past due or nonaccrual.

17 And the answer to Mr. Gibson is, there was a
18 group of loans that for a variety of reasons, the renewal
19 process is taking longer than expected. They are current on
20 interest, but technically, because they have matured, they
21 are past due their principal.

22 And he notes, as a technical matter, a matured
23 loan is past due principal. That's the understanding of the
24 Chief Financial Officer of Wilmington Trust in terms of when
25 loans should be reported as past due. None of this matured,

1 in process of extension. It's past due unless you have the
2 documents executed.

3 And imagine, ladies and gentlemen, if this
4 standard was applied in the third quarter or fourth quarter
5 of 2009, or the first quarter of 2010, when we saw the
6 volume of waived loans, the relevant waived loans that
7 weren't matured, and ask yourselves how the numbers would
8 have looked if Wilmington Trust would have reported past due
9 loans, as Mr. Gibson described in the 2010 second quarter
10 earnings call.

11 There is evidence, and we've seen certain
12 documents and e-mails, and Mr. Gibson received a copy of the
13 credit risk section of the MD&A for the Form 10-K. Here is
14 an exhibit that was introduced through Ellen Roberts in the
15 second quarter of 2010, where Mr. Gibson is suggesting
16 deleting the paragraph on the increase in past due 90-day
17 loans, and notes that the amount nearly tripled, which could
18 be viewed as a leading indicator. Shouldn't we address
19 this?

20 We saw in the Form 10-K, the bank tells the
21 public, the defendants who signed the report tell the public
22 the 90-day past due loan information is one of their most
23 important metrics, and here there is a suggestion to remove
24 that metric, to not address the increase in the 90-day past
25 due loan information.

1 Mr. Gibson also met with Mr. Depman frequently.
2 He was the CFO. Mr. Depman would have been his counterpart
3 as the lead audit engagement partner. Just like with Ms.
4 Rakowski, there were certain inquiries that were made with
5 Mr. Gibson, and here is a specific inquiry that was made of
6 both Ms. Rakowski and Mr. Gibson.

7 And the request is, there's a question: Are
8 there any new estimates or significant changes to existing
9 estimates made during the interim period, which would be the
10 second quarter of 2010? If so, how have such estimates been
11 reported in the interim financial information?

12 And you'll see there, there is a reference to
13 deterioration in credit quality reflected in risk ratings
14 downgrade and increases in loans delinquent 90 plus days.

15 So there's a response to Mr. Depman about 90-day
16 past due loans in the context of risk ratings, but there's
17 no indication that this is a new way that the bank's
18 reporting for past due loans or that they had reported that
19 way in prior quarters.

20 Defendant Harra. Defendant Harra is the
21 president of Wilmington Trust Corporation. According to the
22 bio, and this is from Government's Exhibit 435, joined the
23 company in 1971, held many key positions. Notes that he has
24 specialized in all aspects of commercial and personal
25 financial services.

1 Mr. Harra had been the President and Chief
2 Operating Officer of the bank since 1996, so 13 or 14 years
3 at the time of the charged conduct. And it notes that in
4 addition to his responsibilities as President and COO,
5 "Mr. Harra also oversees all banking activities for the
6 company."

7 And the testimony from the witnesses was, during
8 the period 2009, Mr. Harra was the individual in charge of
9 regional banking, was Mr. Bailey's supervisor, Mr. Conway's
10 supervisor, and the direct supervisor of the leaders of the
11 expansion market.

12 Mr. Harra, like Mr. Gibson, was also present at
13 all of the exit meetings for the Federal Reserve
14 examinations, the full scope examination, the target
15 examination, and also was there in 2010, when the Fed came
16 back for the full scope examination.

17 And there was a reference to Mr. Harra not being
18 a numbers guy. Once again, Mr. Harra is president and in
19 charge of banking for a bank that has \$9.2 billion in loans.
20 He's in charge of regional banking. People report directly
21 to him who are the leaders of the bank relating to the
22 banking.

23 And, ladies and gentlemen, you can't have it
24 both ways. You can't have the position and then make the
25 argument, well, he didn't have the responsibility that went

1 with that position. This is an \$11 billion bank, a \$9
2 billion loan portfolio, \$50 billion in assets under
3 management.

4 Mr. Harra is the president and the COO. So
5 consider that when you hear the argument, or if you hear the
6 argument from counsel that Mr. Harra was not a numbers guy.
7 Mr. Harra signed the MOU. He was certainly aware of its
8 terms. We've talked about the specific terms in paragraph
9 15, and there's Mr. Harra's signature along with the other
10 members of the Board of Directors.

11 There's certainly evidence in the record that
12 Mr. Harra was concerned about delinquencies. The e-mail
13 from September of 2009, where Mr. Harra receives a copy of
14 the August 2009 past due report. He forwards it to his
15 direct report, Mr. Bailey, who is in charge of the Delaware
16 bank. He writes, Brian, delinquencies are headed in the
17 wrong direction. Before you head out today, I hope you can
18 fire up the troops to work on this in view of the pending
19 quarter end.

20 It's important to him. He is the president of
21 the bank. The numbers are going to matter to the market and
22 he's telling his direct report to do something about it.

23 We heard from Mr. Conway that Mr. Harra would
24 share the Mid-Atlantic market meeting, and this is the
25 banking meeting where all of the top personnel, Mr. Conway

1 and Mr. Bailey would be present, and they would talk about
2 issues facing the bank.

3 And this is the agenda from December 9th --
4 December 8th of 2009, where Mr. Gibson also made a cameo
5 appearance and talked about capital generation and the
6 general economic view as of year-end 2009.

7 But look at what was specifically discussed at
8 that meeting. Commercial real estate concentration.
9 Everyone is talking about what is happening with CRE at the
10 time. And specifically, matured/maturing loans and past due
11 loans. So all the leaders within the banking function are
12 talking about this issue during a period of time when the
13 bank is engaged in short-term extensions on a mass scale,
14 and also the loan approval process discussed by Mr. North
15 and Mr. Brewer.

16 Like the other defendants, there's evidence that
17 Mr. Harra received a copy of the draft of the MD&A section,
18 the credit risk section. And this e-mail noted: Dave, left
19 a few comments on your chair early this morning on the paper
20 copy. RVAH.

21 If you recall, Ellen Roberts introduced the
22 actual exhibit that have the initials RVAH 2/8, so this is a
23 version of the document, one of the drafts that contained
24 the past due loan information, the rigorous loan
25 underwriting information, the appraisal information that you

1 saw earlier today.

2 Mr. Harra, as we saw earlier, would sign the
3 certification relating to management's report on internal
4 controls over financial reporting. He also signed the Form
5 10-K as president, COO, and the director of the bank. In
6 addition, Mr. Harra signed the call report, and there's a
7 similar attestation that Mr. Gibson made where, by his
8 signature, Mr. Harra declared that the reports of condition
9 and income have been examined by us, and to the best of our
10 knowledge and belief, have been prepared in conformance with
11 the instructions issued by the appropriate federal
12 regulatory authority and are true and correct, and the
13 evidence has shown that it was not.

14 Mr. Harra was also aware of the additional
15 short-term extensions of a bunch of loans on the last
16 week end in March of 2010. And so, in this particular
17 e-mail, Government's Exhibit 543, there is a reference to
18 people coming in and pulling documents on Friday evening
19 and Saturday to get change in terms agreements for 176
20 deals.

21 So think about that. The date of this e-mail is
22 Sunday, March 28th. All of these people are at the bank.
23 They are pulling documents together. It is, in fact, what
24 Mr. North described it as a fire drill, trying to get all of
25 this information pulled together to extend 176 different

16:07:45 1 lending relationships.

16:07:46 2 And that is information that Mr. Harra is aware
16:07:49 3 of. You've seen the matured loan beast e-mail before and
16:07:52 4 the reference to the fire drill from Mr. North. That is an
16:07:56 5 e-mail that goes to Mr. Harra, and then he makes a response
16:07:59 6 thanking the people that came in over the weekend to extend
16:08:04 7 all of those loans.

16:08:04 8 Now, the timing on this is important, because as
16:08:09 9 Mr. Corkery testified, defendant Harra met with the Federal
16:08:11 10 Reserve two days later in Philadelphia and did not mention
16:08:15 11 the second mass extension push let alone the first.

16:08:19 12 He also met in the exit meeting for the target
16:08:26 13 exam on April 6th, so less than a week after all of the
16:08:30 14 loans were extended. Mr. Harra is there, Mr. Gibson is
16:08:33 15 there, meeting with Mr. Corkery and the other examiners and,
16:08:38 16 once again, neither defendant Harra nor defendant Gibson
16:08:41 17 mentions the mass extensions at that meeting either.

16:08:43 18 There are three counts that relate only to
16:08:50 19 defendant Gibson, and that's making false certifications in
16:08:53 20 financial reports. And the Court has provided the
16:08:56 21 instructions in your packet. But as we roll through them,
16:09:01 22 the first is that defendant Gibson was the CFO at Wilmington
16:09:04 23 Trust. There has certainly been evidence introduced into
16:09:08 24 the record about Mr. Gibson's position, and you have seen
16:09:11 25 that reference in documents.

1 The second is that Wilmington Trust Corporation
2 was an issuer of securities regulated by the Securities
3 Exchange Act. And you'll see in your packet of
4 instructions, the Court instructed you as a matter of
5 law relating to Wilmington Trust being an issuer of
6 securities.

7 The third is that Mr. Gibson certified that the
8 information complied with certain securities requirements,
9 and that "fairly presented in all material respects the
10 financial condition, the results of operations of Wilmington
11 Trust Corporation." You'll see in parentheses references to
12 the certifications introduced into evidence, which are
13 Government's Exhibit 1-A, 4-A, 5-A, and Defense
14 Exhibit 4006.

15 The next is that the certification was
16 materially false.

17 And the final is that the defendant knew at the
18 time that the certification was materially false.

19 And with respect to that last element, I would
20 just ask that you take a look at the stipulation marked S-6,
21 which has a specific stipulation relating to the materiality
22 of a false statement.

23 The Section 1350 certifications, this is 1-A,
24 which I just mentioned. This is essentially the charge that
25 Mr. Gibson made a certification that was false and complied

1 with the elements, as the Court read them to you, but the
2 certification here is that what Mr. Gibson is signing fully
3 complied with all of the relevant requirements of the
4 securities and Exchange Act.

5 And this is Defendants' Exhibit 4006, which is
6 the document that I showed a few minutes ago, where
7 Mr. Gibson made certain certifications. And you'll see in
8 paragraph 4 that there's a specific reference to Exchange
9 Act Rules 13-A, and 13-A and 15-D.

10 What didn't the reports fairly present? They
11 did not fairly present accurate 90-day past due loan
12 information.

13 Now, you might hear from counsel for Mr. Gibson
14 a lot of talk about certifications or sub-certifications or
15 sub-sub-certifications or sub-sub-sub-certifications. All
16 of the evidence shows that Mr. Gibson knew the information
17 was false. He didn't need a sub-certification or a
18 sub-sub-certification from another employee to rely upon,
19 something that he could wash his hands of information that
20 he knew about.

21 So ask yourselves, ladies and gentlemen, if that
22 argument is presented to you about sub-certifications and
23 sub-sub-certifications, what did Mr. Mr. Gibson know at the
24 time that he signed these documents? What statements did he
25 make about past due loans and matured loans and when loans

1 were supposed to be reported, and evaluate that against the
2 arguments of down relating to certifications and
3 sub-certifications.

4 The last area to talk about today is conspiracy.
5 And, again, the Court's instructions are going to control,
6 but essentially, conspiracy is an agreement between two or
7 more people to knowingly defraud the United States or commit
8 a specific offense against the United States, and one overt
9 act in furtherance.

10 And the Court read in a number of overt acts
11 that are listed in your jury charge, and those are the
12 specific acts, and the only acts that you can consider
13 relating to the conspiracy.

14 So what is the conspiracy here? It's as simple
15 as this. It's an agreement to keep the reported past due
16 number down.

17 And as the Court instructed you, the Government
18 does not have to prove a formal agreement, that all of the
19 defendants agreed. As you'll see in the instruction, it
20 requires two or more participants. That it was a good plan,
21 or that it was a secret.

22 You heard a lot of talk in opening statements
23 about a requirement that a conspiracy be a secret. What the
24 Court instructs you at the end of the day, that is what
25 controls.

1 Evidence of a conspiracy can be from reasonable
2 inferences from actions and statements. And the Court also
3 I instructed you that evidence of related facts or
4 circumstances can be considered, and in terms of whether
5 there's a preconceived agreement, scheme, or understanding.

6 And, finally, joining the conspiracy. The
7 Government need not prove that the defendant you are
8 considering knew everything about the agreement, about the
9 conspiracy, or that he or she knew everyone involved in it,
10 or that he or she was a member from the beginning.

11 The Government also does not have to prove that
12 the defendant played a major or substantial role in the
13 conspiracy.

14 Now, I talked a few slides ago that the
15 conspiracy was to keep, it was an agreement to keep the
16 reported past due number down. That's the common scheme or
17 plan that you have to consider, the concealment of the
18 bank's true 90-day number, the true past due number from
19 regulators and investors outside the bank.

20 And here the evidence has shown that each of the
21 defendants possessed common knowledge about mounting
22 maturity issues at the bank, the bad economy and its impact
23 on getting loans extended, and internal problems with the
24 bank's practices and risk management.

25 All of the defendants were aware of the new

1 monthly reporting requirements to report past due loan
2 information under the MOU, and the heightened scrutiny that
3 the Federal Reserve was going to apply given the results of
4 the 2009 examination.

5 And by October and November of 2009, there is
6 evidence that each of the defendants was aware that
7 something had to be done about it, and you've seen exhibits,
8 and you've heard testimony that all four of the defendants
9 were doing, undertaking certain activity relating to
10 matured past due loans beginning in September and October
11 of 2009.

12 Each of the defendants had an important role to
13 play in the process. That they were from different areas of
14 the bank is really of no consequence, or the fact that they
15 might not have had continual contact. They were the
16 decision-makers relating to past due loans. What they knew,
17 what they did with the information, all four of the
18 defendants were essential to keeping the reported past due
19 number down.

20 Mr. North was responsible for the initial
21 waivers. Ms. Rakowski and controller's group was
22 responsible for the past due and nonperforming loan report.
23 Mr. Gibson and Mr. Harra signed the call report, attesting
24 that the information was true and correct to their best of
25 their knowledge and belief. Ms. Rakowski, Mr. Gibson and

1 Mr. Harra signed the Form 10-K.

2 Somehow the evidence has shown that all four
3 defendants are aware that the information is going to be
4 reported publicly. All four defendants are aware of the
5 magnitude of waived loans and the problems relating to
6 extending loans at the end of the fourth quarter of 2009,
7 and without each of the defendants, this doesn't happen.

8 If Mr. North doesn't approve the waivers, the
9 loans don't get waived. If the controller's group doesn't
10 approve the past due nonperforming loan report, the
11 information isn't submitted publicly. If defendants Harra,
12 Gibson or Rakowski don't sign the documents, the information
13 is not transmitted.

14 So by their knowledge, by their conduct, and by
15 their action, you can infer that the defendants were part of
16 an agreement to keep the reported past due number down.
17 Certainly, Mr. Gibson, Ms. Rakowski had more direct
18 interaction with each other. Mr. North had more direct
19 interaction with Mr. Harra, that there are common meetings,
20 common e-mails, common other documents where they come
21 together. And, again, each of the four is a decision-maker
22 in the process and this doesn't happen without them.

23 I want to end with the conspiracy to defraud the
24 Federal Reserve and talk a little bit about the one false
25 monthly regulatory report that was submitted to the Fed in

1 November of 2009. It related to past due loan information
2 from October of 2009.

3 Now, the Court has given a specific instruction
4 that controls relating to defrauding the United States, and
5 the instruction indicates that to defraud the United States
6 means to obstruct or interfere with one of the United
7 States' Government's lawful functions, by deceit, craft,
8 trickery, or dishonest means.

9 And so here, the action of defrauding the United
10 States relates to providing false past due loan information
11 to the Federal Reserve in connection with call reports,
12 monthly regulatory reports and in advance of the target
13 examination.

14 The evidence has shown beyond a reasonable doubt
15 that the October monthly regulatory report was false. We
16 have seen this now several times, the requirement to report
17 past due loan information within 20 days at the end of the
18 month.

19 Remember just a level set on timing. The MOU
20 comes out October 21st of 2009. Five days later, Mr. Harra
21 writes the e-mail relating to matured loans being critical
22 issues and overemphasizing the importance of the company.

23 The evidence didn't -- the evidence doesn't show
24 that Mr. Harra just decided to get up and do this one day.
25 This is five days after the MOU. The bank is being forced

1 to do this. This is the information that's being pushed out
2 to all of the chief lending officers at the bank. This is
3 what's now required by the Federal Reserve who is asking for
4 information on a monthly basis.

5 And so we saw the e-mail from Ms. Rakowski, and
6 the date of that e-mail is October 28th of 2009, two days
7 after the Harra e-mail goes out to the lenders. Once again,
8 the unity of purpose, where everyone is now dealing with a
9 new mandate that comes down from the Fed. Where Ms.
10 Rakowski learns specifically about waived loans, Mr. North
11 knew the volume beforehand, the evidence has shown, but he's
12 on this e-mail as well, and this is the e-mail that again,
13 you want to take a look at. It's the desk file,
14 Exhibit 524, that has handwriting on it relating to past due
15 and call reports.

16 The first MOU submission, and this is
17 Government's Exhibit 247, was the September 2009 past due
18 report, and it was sent to the Federal Reserve on
19 October 30th of 2009, where essentially, the document is
20 showing \$17 million in commercial loans. This is the
21 information that is going to the Fed in the very first
22 report after the Fed mandates the MOU.

23 And as we saw in the slide before, that
24 information was false. It did not include the waived loans.
25 And you can see the significant difference when the number

1 jumps. There it's 369 million. When you exclude certain
2 information, it's around 296 million.

3 So the very first report that goes to the Fed
4 after the very critical examination process in the MOU is
5 false.

6 Fast-forward to the next month, November 16th of
7 2009, where Steve Cummings does what he always did, sends a
8 final delinquency report to the controller's group after it
9 was approved by Mr. North. He says, attached is the final
10 list. That report goes to Ms. Rakowski from Faye Loh, and
11 says, Kevyn, attached is the report from Steve. Loans with
12 "Y" in the waived column is not included in our final
13 numbers.

14 Ms. Rakowski forwards that information to
15 Mr. Gibson, and you can see it actually contains the
16 spreadsheet with the Excel label, xlsx for October 31st of
17 2009. And she says, we did pull the waived loans from the
18 past due report, and references in the next-to-the-last
19 sentence, and this is an important statement, "Have not had
20 time to look at this or go back and do a comparative.
21 Numbers for October still seem to be higher than I would
22 have expected."

23 And that word "comparative" becomes important
24 when you evaluate what was actually sent to the Fed in
25 connection with the monthly regulatory report.

1 So on November 25th of 2009, a letter goes to
2 the Fed, and it contains the October past due and
3 nonperforming loan report. And there's a particular
4 paragraph in that letter that relates to how Wilmington
5 Trust is reporting past due loans. And ask yourselves,
6 ladies and gentlemen, based on all of the evidence and all
7 the testimony that you've heard in this case whether that
8 information is truthful or not.

9 It notes that you -- you will note in the
10 October 2009 past due and nonperforming loan report a rise
11 in the past due balances for October when compared to the
12 past due balances for September, the end of a calendar
13 quarter. This rise in past due balances for months other
14 than the end of a calendar quarter are not unusual, as we
15 have historically ensured that loan payments are collected
16 quarterly.

17 I have also enclosed calendar quarter end past
18 due and nonperforming loan reports for the past five
19 quarters. A comparison of these quarter-end reports better
20 reflects the payment history and capacity of our borrowers.
21 We have recently implemented changes in our billing and
22 collection practices so that in 2010 we expect to see more
23 normalized monthly balances and trends for past dues in
24 these reports.

25 This is the information that's going to the Fed.

1 Remember, none of the information contains any waived
2 matured loans, and the representation is, we're going to
3 compare what is in October to what comes from other months,
4 and you are going to see in a moment, the other months
5 didn't contain waived loans either.

6 And what is the representation here? That the
7 bank is changing its billing and collection practices.
8 Well, what's happening on November 25th of 2009? They are
9 starting to go through the mass extension practice.

10 So there's no reference in this letter to
11 anything having to do with the waiver practice or a mass
12 extension practice. It's attributing a rise in past due
13 loans in October to billing and collection issues.

14 Here is what was reported. So as you can see,
15 the report, November 20th, 2009, if you remember from the
16 MOU, it had to be submitted, or printed out 20 days at the
17 end of the quarter. And there's certain loan information
18 reported as of October 31st of 2009.

19 As Mr. Hart testified, that that amount equaled
20 64.4 million in the relevant commercial loans, but look at
21 what wasn't included, \$300.1 million. These were loans
22 that, you know, they weren't excluded because of billing or
23 collection issues. These are matured loans. November 25th
24 of 2009, a time that everyone realizes there's a big
25 problem, that matured loans are overwhelming, and this is

1 the information that's provided to the Federal Reserve, and
2 that relates to Counts 10 and 16 of the indictment.

3 Now, that comparison that we saw, if you're able
4 to take a look at Government's Exhibit 243, which is the
5 actual report, you can see that someone from Wilmington
6 Trust prints out the past due report for September of 2008
7 on November 20th, for December of 2008 on November 24th,
8 June of '08 on November 2009, and September of 2009 on
9 November of 2009.

10 So three of the four reports are printed out the
11 same day as the October monthly regulatory report and all of
12 this is sent to the Federal Reserve to be part of the
13 comparison. None of this information, ladies and gentlemen,
14 none of the prior reports contain any waived loan data.

15 And earlier you saw that that letter, the
16 November 25th, 2009 letter that went to the Federal Reserve,
17 Mr. North had an earlier copy of the letter in his
18 enforcement binder that was ultimately provided to
19 Mr. Brewer.

20 The other monthly submissions were also false.
21 So in the large packet, Government Exhibit 247, it is like
22 200-plus pages of past due information submitted under the
23 MOU. Here is the version submitted December 31st of 2009.
24 It reports about \$7.8 million of past due loans. If you
25 recall, the actual number from the charts was close to 300

1 million that was waived. March of 2010, \$20.5 million
2 reported. A little bit over \$31 million in waived.

3 So the relevant monthly regulatory reports
4 during the conspiracy period that are important to the
5 Federal Reserve at the time period, they're all false.

6 We've also seen that waived loans were not
7 included in the target examination and you saw this exhibit
8 before. This is L-3. This is the first day request that
9 the Fed made in connection with the target exam. If you
10 recall, this is September of 2009, not even a page full of
11 over 90-day loans and none of the waivers.

12 And, finally, consider this in mind when, or
13 when or if any of defense counsel makes an argument about
14 the Federal Reserve knowing about the waiver practice.
15 Once again, this is the memorandum that is sent out by Mr.
16 North to Mr. Harra. Mr. Gibson was present at the meeting
17 where matured loans were being discussed, and Mr. North
18 notes, I would also suggest that we share this game plan
19 with Jim Corkery at the Fed, and the evidence has shown that
20 that did not happen.

21 Last legal point. There's an instruction
22 relating to responsibility for offenses committed by
23 co-conspirators. It's under the heading Pinkerton. It's
24 important that, ladies and gentlemen, that you review that
25 specific instruction, which is going to control, but it

1 talks about liability for substantive offenses, so we have
2 the conspiracy offense, which is Count 1.

3 The remainder of the offenses are called
4 substantive offenses. And so for each of those offenses,
5 the Court has given you specific instructions that if you
6 find that a defendant was a member of the conspiracy and
7 that the acts of the other was reasonably foreseeable to him
8 or her, that they can also be responsible for the underlying
9 offenses, so we would ask that you carefully consider that
10 instruction in discharging your responsibilities.

11 So I think there's only one thing that probably
12 all of us agree upon, and that's just to thank you for your
13 service. This has been a tremendous undertaking, a
14 tremendous public service that you've performed over the
15 last seven to eight weeks, and you certainly have some more
16 work to do.

17 You are going to hear from counsel for each of
18 the defendants and then you'll hear at the end of the case
19 one last time from Mr. McCall. And at the end of
20 everything, we're going to ask that you return the only
21 verdict consistent with the evidence, and that's a verdict
22 of guilty as against all the defendants as to each of the
23 charges.

24 Thank you for your time.

25 THE COURT: Thank you, Mr. Kravetz.

1 All right. So, members of the jury, I believe
2 that Mr. Kelly is going to start on Mr. Harra's behalf,
3 though we know we're going to finish at 5:00 today, and the
4 expectation is not that Mr. Kelly will finish in a
5 half-an-hour, so he will continue tomorrow morning.

6 Right?

7 MR. KELLY: Yes, Your Honor. I'm not going to
8 keep the jury past 5:00 o'clock. I will try to get as much
9 as I can and finish up tomorrow if that's okay with Your
10 Honor.

11 May I proceed, Your Honor?

12 THE COURT: Yes.

13 MR. KELLY: Mike Kelly. I represent Bob Harra,
14 and I join Mr. Kravetz's thanks. I know it has been a long
15 time, and on behalf of Mr. Harra and my team, thank you so
16 much. It's how the system works and we need people like you
17 to put in the time.

18 We didn't put in a -- the defense hasn't put in
19 a long case for one reason, and Judge Andrews, His Honor
20 explained to you, the Government, the Government alone has
21 the burden of proof here, and they have to prove a lot of
22 things for each element, but one of the most important is
23 they have to prove beyond a reasonable doubt that each of
24 the defendants, in my case, Bob Harra, had what they call
25 criminal intent, that he knew what he was doing was wrong

1 and he said, I'm going to do it anyway.

2 And I didn't hear anything in the five weeks of
3 the Government testimony. I heard about concern and the
4 numbers were rising and the Great Recession, but I didn't
5 hear anything about -- and I didn't hear anything just now
6 about, hey, don't do this. It's wrong. Don't do this.
7 It's the wrong way to report. This is not the way to do it.
8 In fact, I didn't hear any evidence that Mr. Harra even knew
9 what the regulations are. In fact, the only evidence that
10 came in was Mr. Depman.

11 Remember I asked him, is Bob Harra the kind of
12 guy that knows regulations? And he chuckled and he laughed.
13 And I want to spend some time on that, but I'm also going to
14 spend some time on evidence, and not just documents.

15 I frankly was waiting all along after five weeks
16 of testimony. It's like the person who is telling you -- I
17 don't know if you had this experience, telling you a long
18 story. I get this with my kids. When are you going to get
19 to the point, dad, or a joke, when is the punchline? When
20 is the punchline? I kept waiting and waiting. All right.
21 You know, they say it's wrong, they say this is the right
22 number, but where is the evidence that somebody else says,
23 this is the wrong way to report? They were reporting these
24 loans the same way for 28 years, 28 years, and you saw the
25 e-mails, and I will get to them probably tomorrow.

1 Everybody knows about it and they're disclosing it. They
2 are not hiding it. You know, 72 people.

3 I want to talk about what was disclosed in
4 writing to KPMG. I want to talk about what was disclosed in
5 writing to the Fed. And I kept waiting for it. My
6 goodness, where is the evidence, any of it, that these four
7 and my client, Bob Harra, said, oh, my gosh. I know this is
8 not the right way to report this. Oh, my goodness. You
9 didn't hear it.

10 And all this testimony from 22 witnesses, let me
11 read to you testimony. Again, we heard a lot about, and,
12 you know, I was waiting for the punchline. How long were we
13 here? Risk rating, supplemental financing, ten percent rule
14 and all of these things. And remember when I said in the
15 opening, this case centers around the reporting of matured
16 loans that were current for interest in the process of
17 extension. I kept waiting to say, what does all of this
18 stuff have to do with that?

19 This case centers around the allegation that
20 this man right here intentionally concealed from the
21 Government, concealed from the Government how they were
22 reporting these loans as if some point, after 28 years, you
23 know, he woke up and said, you know what, I'm going to --
24 you know, they've been doing it for 28 years, as long as
25 I've been here. I'm going to commit a crime and I know what

1 I'm doing is wrong.

2 Come on. Let me read you the testimony and
3 paraphrase. This is Mr. Corkery. The case centers around
4 concealing this reporting of matured loans, and everybody
5 calls it the waiver practice. Okay. Supposed to say the
6 waiver practice.

7 And Mr. Corkery was told that the matured loans
8 were not considered to be past due, interest was current,
9 and progress was being made toward renew and extension?

10 And he said yes.

11 And this document was given by the bank to the
12 Fed during the 2010 full scope exam, was it not?

13 Yes.

14 These are the federal work papers?

15 Correct.

16 And they are the federal work papers.

17 "This document describes the bank's waiver
18 practice, doesn't it, Mr. Corkery?

19 "Answer: It doesn't say waiver, but, yes.

20 "Question: It doesn't talk about the bank's
21 treatment of its matured loans though, does it?

22 "Answer: It does.

23 "Question: This document describes the bank's
24 waiver practice, doesn't it, Mr. Corkery?

25 "Answer: Yes."

1 Conceal the waiver practice? When this guy -- I
2 didn't hear much about testimony here. Mr. Kravetz is a
3 great lawyer, he's a good man. This team, they're good
4 people, they are doing their job, but the stakes are high
5 here, and concealing the waiver practice from the Fed when
6 this guy under oath says it wasn't concealed? I submit to
7 you the case should be over on that alone, on that alone.
8 Criminal intent?

9 Now, let me display to you a document. I don't
10 know if you can read this. This is the issue. They yelled
11 at me for turning around during my opening. Look, I've got
12 a screen here. I'm going to look at it. Can you see it?

13 All right. And this is April 13th, 2010. Look
14 at the lower right. Federal Reserve, BP. That's from the
15 Federal Reserve files. Look at the top. Issue 220.
16 Properly process and account matured loans. Short-term
17 extensions approved. Comprehensive portfolio review
18 progressing.

19 And look. In the past, the level of matured
20 loans was problematic. However, these matured loans were
21 not considered to be past due if interest was current and
22 progress was being made towards renewal/extension.

23 All right. This was disclosed to the Feds. I
24 just read you the testimony. Here's the documentation here.
25 Disclosed in writing, in writing.

1 Conceal the waiver practice? Their burden of
2 proof. We have no burden of proof, none. As you heard His
3 Honor say, we don't have to come up with any evidence,
4 nothing. It's all their burden of proof, and they're saying
5 it's conceal the waiver practice.

6 You know, I was looking at all of these things
7 that, this other stuff that I said I kept waiting for the
8 punchline, and, you know, the risk rating, interest
9 reserves, the appraisals. Right. And in closing, I can
10 come up with an analogy; right? And because I played
11 football and boxed all my life, I'm going to try to avoid
12 all of those.

13 But how about a shotgun? Let's hear about all
14 of this stuff. Let's hear about how bad the bank was.
15 Let's hear about the risk rating, the supplemental
16 financing. And how long did we talk about that stuff? That
17 was most of the testimony, concealing the waiver practice
18 and the intent to conceal the waiver practice.

19 And how much of the stuff was about the bank?
20 Right? We're talking about these four people right here.
21 You know, the bank did this, the bank did that. How much
22 did we hear that Bob Harra, said, oh, I know this is wrong
23 and I'm going to do it anyway. You didn't hear anything
24 about that. How is that? You didn't hear anything about
25 that.

1 You didn't hear anything that he ever thought
2 that anything he was doing was illegal. You didn't hear
3 anything about anything he thought he was doing and
4 following along 28 years was a crime.

5 All right. Risk rating, supplemental financing.
6 Bob is not charged with any crime of having bad appraisals,
7 abusing the ten percent rule. By the way, the bank changed
8 that rule, changed that rule in 2008, and Joe Terranova
9 stopped it in the fall of 2009. Supplemental financing.
10 The bank changed that rule in April of 2009.

11 And where is the evidence that Bob abused the
12 ten percent rule, abused the interest reserve, that Bob
13 abused supplemental financing? Guess who did abuse? Take a
14 wild guess. Joe Terranova and Brian Bailey.

15 And what did the bank do? What did the bank do
16 with them? Oh, they fired them. They fired them.

17 So this document, you know, the Feds have it in
18 their possession. There is the number, and look at the
19 date. It's all there. It's all there.

20 Now, let me just say something, because I am
21 going to be back tomorrow and hopefully not too long. But,
22 Your Honor, may I leave the podium?

23 This man is not a liar. This man did not
24 defraud the Government. This man -- the evidence has not
25 shown that this man has done any of that. The evidence has

1 shown to the contrary. That he's an honest man, that he's a
2 truthful man. And I ask you, look, I didn't keep them on
3 very long, but the Government put his truthfulness and
4 honesty at issue, and I ask you, and I ask you to think
5 about this. Would the Reverend take an oath in this
6 courtroom and lie about what he thought about Bob Harra's
7 truthfulness? And I ask you, would Brother Ronald come in
8 here and take an oath, and when you say, what's the
9 truthfulness and honesty on a 1 to 10? He said 13. Think
10 about that. Think about that. Think about what evidence
11 the Government came up with will to show this guy would lie
12 to anybody.

13 This guy would lie to the Government? Worked
14 his way up in the bank, trainee. This guy is going to lie
15 to the Government? Risk everything he worked for? Risk his
16 family's name? Do you really think beyond a reasonable
17 doubt?

18 The Government called 22 witnesses, 22. Not one
19 of them, not one of them that was asked -- not all were
20 asked, but not one that was asked said Bob told them to lie
21 to the Government. This is a fraud case. This is a conceal
22 from the Government case.

23 Did any of them say Bob told them to conceal
24 anything? Not one. In fact, they said to the contrary.
25 Mr. Brewer said, Mr. Harra never asked him to conceal

1 anything from the auditors, regulators, anyone else.

2 Mr. Conway, he started the same day. Remember
3 they started 40 years. They worked alongside. Said never
4 asked him to conceal or lie to the Government, and he said
5 never. And I agree with my friend, Mr. Kravetz. You do
6 look at how the witness presents himself or herself
7 remember when we asked him, did he ever do that? Never,
8 never.

9 And the list goes on. Their witnesses,
10 Mr. Infanti, Tosha Styles, Ellen Roberts, Mitch Slijepcevic.
11 All I remember he gives the Mitchapalooza. That's all I
12 remember, but I don't know if I pronounced his name right.
13 Barbara Marley. John Depman. Even John Depman, KPMG.
14 Steve Cummings. None of these people. They all said that
15 neither Bob nor anybody else told them to lie about what
16 was in the report, all of these people in the Wilmington
17 Trust.

18 I will talk to you tomorrow about the burden of
19 proof, beyond a reasonable doubt. Beyond a reasonable doubt
20 means you can't speculate. If there are holes in their
21 case, you can't say, I'm going to fill in those holes, I'm
22 going to speculate. And you heard His Honor say, if it's a
23 possible doubt, that's not enough. All of these people,
24 where is the evidence this guy lied or tried to conceal
25 something from the Government?

1 Just because they say it's wrong doesn't mean
2 it's wrong. 28 years. All of these people. They've got
3 accountants, they've got lawyers. They've got other people
4 onsite in the bank. They've got KPMG looking at this,
5 certifying. Right?

6 I will get to Mr. Depman. Remember he was the
7 guy that couldn't even -- remember I said, how about a
8 ballpark of what you make, how much they paid you? Oh, I
9 don't even know. Come on. Can you estimate? No. Remember
10 it was \$2 million a year?

11 Now, these guys come in, they say they don't
12 know and they're there since 2001. Thirteen, fifteen,
13 whatever the people was onsite and they're certifying, and
14 they say they don't know? I will show you later how they
15 know in writing.

16 You know, I mentioned the witnesses and I will
17 get to those in a second. But wouldn't you think in this
18 case where they are charging my client with 15 felonies,
19 that they would come up with one document that says, hey,
20 Bob, you know, this is the wrong way to report these loans.
21 Did you see that? No, ma'am. No, sir.

22 Was there concern about the rising number of
23 matured loans? Yes. Was there concern about a lot of
24 rising numbers during the Great Recession? Yes. Sure,
25 there was concern.

1 And what is the evidence? Remember Mr. Brewer,
2 Mr. Conway said, we had a problem. We're trying to do our
3 best to get around and come forward with a plan. There was
4 concern, but where is the evidence that, aha, that's the
5 wrong way to do it. Let's change it.

6 Where is the evidence that somebody said, hey,
7 Bob, this is the regulations that say this and it's wrong.
8 I know he doesn't have to be aware of the regulations.

9 Mr. Kravetz, remember, he pointed to the TFR and
10 he said, there's no evidence that anybody saw that. Well,
11 guess what? What he didn't tell you was, there's no
12 evidence that Mr. Harra or these other three saw the RC-N
13 either.

14 So the only evidence, is Bob not aware of how
15 these things are reported? Sure, he's not, you know, a
16 numbers guy, but, come on, he's not acting as an accountant.

17 Remember when I asked John Depman? I said, is
18 Bob Harra the guy you go to to verify these numbers? He
19 laughed. Remember when I asked Ellen Roberts, and I said,
20 Ms. Roberts, did you ever go to Bob Harra to verify the
21 numbers reported? No.

22 Who was the final word? Ted Cecala. And, by
23 the way, you know, about all these people that report to
24 Mr. Harra. Please don't forget this. Mr. Kravetz alluded
25 to this. During 2009 and '10, during this conspiracy,

1 everybody, Mr. Harra and Mr. Gibson and Mr. North reported
2 to Ted Cecala. They did not report to Bob Harra. So I hope
3 that you don't say, gosh, well, he's the president, and
4 Mr. Kravetz said, oh, you know, he's the top dog, you know,
5 how can he not know?

6 Mr. North, Mr. Gibson did not report to Bob.
7 They reported to Mr. Cecala. And guess who Bob reported to?
8 Mr. Cecala, the final word on numbers. There's no evidence
9 that Bob was down there knowing what the regulations are.

10 Let me show you another document. All right.
11 This is the first document I showed, but this is during the
12 target exam. So look at the date. Do you remember the
13 first one was April 13, 2010. Now I'm looking at the
14 July 9, 2010. So it's said again. Right? So don't tell me
15 I just saw some document once, I didn't read it. Look.
16 Look at -- I'm zooming in. I'm turning around. I should be
17 looking at you.

18 Look at the bottom. It's the Federal Reserve
19 document. It's Bates stamped. They have that. They have
20 it again. It's in their files.

21 Now, you know, I want to read to you, I just
22 mentioned that there's not one document that says don't do
23 this, it's the wrong way to report it. All right? Because
24 you've got to have that criminal intent to say what I know
25 I'm doing is wrong, and it's not one witness that says that.

1 Not one.

2 Let me read you another quote from Mr. Corkery.

3 The bank provided the Fed with notice in writing of its
4 waiver practice, did it not?

5 Yes.

6 That's another quote. Conceal the waiver
7 practice. That's his testimony. That's the bank examiner's
8 testimony. Are we here to talk about concealing the waiver
9 practice? They provided notice.

10 That's the Government's witness. And
11 Mr. Corkery is a good man. Nobody is here to cast
12 aspersions, but the stakes are high here to say, oh, my
13 gosh, you concealed this? How can they say they concealed
14 it when the Fed had it in their files, and then you've got
15 Mr. Corkery up here saying, it wasn't concealed.

16 Now, the Government said in their opening some
17 things that I just want to challenge them on, and I'm not
18 going to -- a guy whom I loved, represented for years, and
19 I'm not going to mention his name, but he was a famous boxer
20 who used to say, Mike, if you are going to talk the talk,
21 you'd better walk the walk. A lot of people say that, but
22 he said it all the time.

23 And in the opening, the Government said that the
24 defendants came up with the waiver practice to hide loans.
25 They said also, they made up their own rules. They came up

1 with a new scheme.

2 We didn't come up with a waiver practice. Is
3 28 years coming up with something new? You're the
4 decision-maker. I say not.

5 Rich Conway said 28 years in good times and in
6 bad, and it was a decades old -- they showed you a couple
7 e-mails saying, yes, a decades old problem. You've got all
8 of those matured loans. What do you do with this? Tosha
9 Styles said it was a longstanding practice. That's her
10 word, practice.

11 She also said the process stays the same. Steve
12 Cummings said the same thing. But I hope you remember this,
13 that that practice was in effect from the testimony
14 28 years.

15 Now, let me ask you this: If you want to
16 conceal something, do you keep doing it the same way you've
17 been or do you change it? I want to talk tomorrow about,
18 you know, the bank gave the Fed this issue 220 document.
19 That's the audit committee of the board, high level. Gave
20 it to the Fed. They got it. That went to the audit
21 committee of the board.

22 They also gave the Fed, you will hear about
23 tomorrow, loan files that the Fed actually picked up, and
24 you're going to hear tomorrow about Mr. Fomunyan and
25 Mr. Corkery, the loan files that they actually reviewed, and

1 they admitted that they reviewed. Right? And those showed
2 the maturity date and they showed it was like thirty-some
3 million. And then they are reporting eight million, like,
4 aha, okay.

5 But I'm also going to talk about this ALERT
6 data, this spreadsheet that had all the details of like
7 8,000-some loans. Had it all there. You know, I heard
8 Mr. Kravetz say, yes, well, Mr. Corkery didn't read it and,
9 you know, too cumbersome or whatever it was. I reviewed it
10 for form, not substance. But guess what? They had it.

11 So I want you to remember those three things,
12 the issue 220, the loan files that they had and the
13 spreadsheet.

14 But here's my point, and maybe I will end on
15 this point if it's okay with Your Honor. If you wanted to
16 conceal something, when the Government asked for those
17 spreadsheets, and, you know, oh, well, we don't look at that
18 stuff. Why did you ask for it? They asked for it. If you
19 wanted to conceal something, you would have gone in there
20 and you would have said, oh, let me change this. Let me
21 change that. They gave it to them. They gave it to them.
22 Is that concealment? Is that concealment?

23 So I will come back tomorrow and I won't keep
24 you that much longer, and I hope you are not mad at me for
25 keeping me close to the end. It's high stakes here.

1 Fifteen, I hate to say it, 15 felonies against this man, but
2 I will finish up pretty quickly tomorrow. And at the end of
3 tomorrow I will show you that the Government has failed in
4 their proof, in their burden of proving that this man ever
5 for an instant intended to do something wrong.

6 Thank you very much, and don't leave, because
7 I will be back tomorrow. I want you in the same seats.
8 Okay?

9 THE COURT: All right. Thank you, Mr. Kelly.
10 So, members of the jury, I will let you go in
11 just a moment.

12 One thing that I am -- can you just hold on a
13 second?

14 So what I would like to do is tomorrow, because
15 I really would like to make sure we get all the closing
16 arguments and the end of my charge in and so that the case
17 is given to you tomorrow -- it may be given to you too late
18 in the day for you to do anything about it, but to make sure
19 that we aren't still arguing on Wednesday morning, I'm going
20 to cut the lunch hour down to a half-an-hour, but the
21 Government will provide you with the lunch. And so my
22 assistants, who you all know, will have some menus from one
23 of our favorite local places and lunch, you'll have a chance
24 to order whatever it is. And so we're still going to start
25 at 9:00 o'clock.

1 And I guess the other thing is, in terms of once
2 you do get the case to deliberate, how late you're going to
3 stay, that is going to be up to you. The basic rule is as
4 today, if one of you have -- you know, it's whoever -- I
5 mean, you kind of set your own schedule once you start
6 deliberating, but if you want to go beyond 5:00 o'clock and
7 it's agreeable to all of you, you can do that. If it's not
8 agreeable to all of you, then you will finish at
9 5:00 o'clock.

10 So two things between now and tomorrow morning,
11 which is, don't talk to each other about the case. Don't
12 talk to anyone else about the case. Don't let anyone talk
13 to you about the case.

14 You'll have it to deliberate amongst yourselves
15 soon enough, but no deliberation until the lawyers have
16 finished arguing, I've finished charging, and you have the
17 case, which hopefully will be towards the end of the day
18 tomorrow.

19 The second thing is, still, don't use electronic
20 resources or anything else to look up anything about the
21 case. Make sure that in terms of evidence, it's closed.
22 You have all the evidence you're going to have. In terms of
23 argument, I'm going to keep an open mind. Do listen to
24 whatever you are told tomorrow, but don't do any research
25 to try to find out something that you have a curiosity

1 about.

2 All right. I think that's it. Make sure you
3 are here and ready to go at 9:00 o'clock. Thank you very
4 much.

5 (The jury was excused for the evening recess.)

6 THE COURT: All right. So we'll meet tomorrow
7 morning at 8:30 to see whatever it is we've learned about
8 what Mr. Kravetz said, and if when you get the transcript
9 tonight you think there's something that, that there's some
10 curative instruction that I need to make, I would certainly
11 consider it to be a good thing if somebody e-mailed me the
12 proposed curative instruction before 8:30 a.m. tomorrow
13 morning. I don't really care whether it's 8:00 a.m.
14 tomorrow morning or sometime tonight, but let me know what
15 you have in mind and let the Government know, too. All
16 right?

17 MR. NOWAK: Yes, Your Honor.

18 MR. KRAVETZ: Your Honor, another application
19 for tomorrow going forward.

20 We would request that counsel be precluded from
21 referencing the high stakes of what's at issue here. It
22 comes very close to referencing punishment. If it happened
23 once, it wouldn't be as much, but it happened three times
24 during the closing.

25 THE COURT: Well, I think this was in

1 permissible bounds, so I'm going to deny that.

2 All right. Is there anything else?

3 MR. KRAVETZ: No, Your Honor.

4 MR. DALTON: No, Your Honor.

5 THE COURT: Okay. See you all tomorrow morning
6 at 8:30.

7 Actually, yes. See you tomorrow morning at
8 8:30.

9 Actually, I knew there was something else. I
10 sent out a verdict form over the weekend. I'm going to put
11 that in production tomorrow because I'm going to hand it to
12 the jury whenever I get to the end of my charge.

13 I take it if there's somebody who has seen
14 anything on the verdict form they want to bring to my
15 attention, at least mention it tomorrow morning at 8:30.
16 Okay? Otherwise, it's going as it is.

17 MR. KRAVETZ: Yes, Your Honor.

18 THE COURT: All right.

19 (Court recessed 5:02 p.m.)

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